ELEMENTS

OF THE

LAW OF PARTNERSHIP

BY

FLOYD R. MECHEM, LL. D.

Author of Mechem on Agency, Mechem on Public Officers, Mechem on Sales, etc.
Formerly Tappan Professor of Law in the University of Michigan,
Professor of Law in the University of Chicago.

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PREFACE TO THE SECOND EDITION

The considerable growth of the law of Partnership in the last twenty-four years and especially the advent of the Uniform Partnership Act have been thought to justify a new edition of this little book. Several new sections have been added, the Uniform Partnership Act has been incorporated, and the range of citation of cases has been somewhat extended; otherwise its scope and purpose have not been changed. It has seemed desirable to renumber the sections.

FLOYD R. MECHEM.

UNIVERSITY OF CHICAGO,
May 1, 1920.

PREFACE TO FIRST EDITION

Several years ago the writer printed for the use of his class a brief course of lectures on Partnership. A wider demand for them having sprung up, they have been revised and reprinted in the hope that they may be useful to students elsewhere. They pretend to be nothing more than the mere elements of the subject, and the endeavor has been to keep them in small compass. The citation of authorities has been purposely limited to the leading and most readily accessible cases, and those cited have been selected rather as illustrations of the text than as authorities for it. Much statement of cases in the text has been avoided, because the lectures were designed to be used and were in fact used in connection with a volume of selected cases upon the subject.

It is assumed that the study of Agency will precede that of Partnership, and some knowledge of the former subject has been constantly taken for granted. If the style at times seems to be didactic, the circumstances of the original composition will serve as an explanation.

FLOYD R. MECHEM.

UNIVERSITY OF MICHIGAN,
Ann Arbor, May 1, 1896.

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INTRODUCTION

In general.—In a rather general way, what we call the law may be said to consist of the rules which prescribe and determine the legal form and effect of human relationships and activities. Inasmuch as, in a general way, one may frequently act either alone or in conjunction with others, a rather obvious though somewhat loose classification may be made into (1) the law of individual activity, and (2) the law of associated activity. The latter body of law, which may be called the law of associations, could be divided into two fields, namely, (1) The law of incorporated associations (meaning by "incorporated" that they have received some special charter or franchise from the State to exist or act as an associated body), and (2) The law of unincorporated associations (sometimes though erroneously called "voluntary" associations). Of each there would be many classes, but one classification would be into those which were created to carry on a business, as distinguished from those whose purpose was social, political, religious, educational, or the like. We might thus have unincorporated associations organized for the purpose of carrying on a business with a view to pecuniary profit. When we have reached that point we have arrived, as will be more fully seen from the discussion which will follow, pretty nearly if not quite at the modern law of Partnership.

Historical.—Partnership is of ancient origin. It was known to the Romans and rather highly developed. It was adopted

and regulated by statutes in the commercial cities of Europe, and was thence engrafted upon the English common law. Since its incorporation into the latter system it has lost many of its former characteristics and has acquired others which were entirely unknown to it in its origin.

The following comparison of the English and the Roman Law of Partnership will be of interest:

"The English Law of Partnership," says Mr. Scrutton,[1] "is derived from three sources, the Common Law, the *Lex Mercatoria*, and the Roman Law. Of the *Lex Mercatoria* we need only say here that it appears in itself to have been at least partly based on Roman law. Mr. Justice Story has made an elaborate and detailed investigation of the relations of the Common to the Roman Law, and finds great similarity between them. Both laws recognize the difference between a partnership and a community of interest, and provide that no new partner can be introduced without the concurrence of the original partners. But the Common law has refused to follow the Roman law in holding invalid an agreement that the personal representative of a partner should succeed him in the partnership. Both laws require a partnership to be in good faith and for a lawful purpose; and that all partners must contribute something, whether property or skill, to the common stock. Both require community in profits among the partners and, to a more limited extent, community in losses. In the absence of express agreement both laws require an equal division of profits. The Common law formerly went beyond the Roman law in making persons who share the profits of a trade liable by operation of law to third persons as partners, but this rule was overthrown in Cox v. Hickman.[2] Both laws recognize a division into universal, general, and special partnerships, though the chief Common law division is into public and private partnerships.[3] Both regulate the duration of the partnership by the consent of the partners, but the Roman law went further than the English, and prohibited partnerships extending beyond the life of the parties. No particular forms for the constitution of a partnership were required by either law. By the Roman law, the mere partnership relation conferred less extensive powers of disposition of the partnership property than are given by the Common law. A Roman partner could not bind the firm by debts, nor alienate more than his share

1 The Influence of the Roman Law on the Law of England, by Thomas Edward Scrutton, Select Essays in Anglo-American Legal History, vol. 1, p. 220.

For a further account of the "law merchant," see § 1, of Professor Melville M. Bigelow's book on Bills, Notes and Cheques, (2d ed.)

2 See *post*, § 88-90.

3 But see as to this classification, *post*, § 3.

of the partnership property. But in the absence of express stipulation, and with some limitations, each partner of an English partnership may be taken, by outsiders, as having an equal and complete power of administration over the whole of the partnership affairs. Both laws admit a discharge of a debt to or by one partner to be good for or against the whole firm. In the Common law, within the scope of the partnership, the majority have a right to govern, but in the Roman law the express or implied assent of all the partners is required. Both laws make partners liable to each other for negligence or fraud, and require a withdrawal from the partnership to be in good faith. Both laws consider a partnership for no certain period as dissoluble at the will of any partner; but the Roman law went further than the Common law in requiring that the dissolution should not take place at an unseasonable time. Both laws allow the court to dissolve the partnership in case of positive or meditated abuse of it by a partner, or when its objects are no longer attainable, as in the case of a partner's insanity. By both laws, the assignment of his interest by one partner, contrary to the will of the others, dissolves the partnership. Both laws dissolve the partnership by death; and many of the provisions in both laws for taking an account and winding up a partnership are similar, though the English sale is more convenient than the Roman division. Whilst English partners are liable to third parties *in solido*, by the Roman law they were only liable *pro parte*.

"This enumeration shows a sufficient agreement between the two systems to justify the assertion that while the method of the introduction of so much Roman law in early times is not clear, in later times most of its leading principles have become incorporated into the Common law of Partnership."

Perhaps one further quotation may be justified:

"During the Middle Ages," says Mr. Mitchell,[4] "contracts of partnership were common, and at their close companies with freely alienable shares had come into existence. In the early centuries the most common form of partnership was the '*commenda.*' This was a partnership in which one of the parties supplied the capital, either in the shape of money or goods, without personally taking an active part in the operations of the society, while the other party supplied none or only a smaller fraction of the capital and conducted the actual trade of the association. This form of partnership was especially used in maritime trade and was often confined to single ventures. Its popularity was due to the fact that it enabled the capitalist to turn his money to good account, without violating the canonical laws

4 Early Forms of Partnership, by William Mitchell, Select Essays in Anglo-American Legal History, vol. 3, p. 183.

against usury, and enabled the small merchant or shipper to secure credit and to transfer the risk of the venture to the capitalist. * * *

"But side by side with the *commenda* there existed throughout the Middle Ages a closer kind of partnership in which the partners were normally coördinate members of the association with the same privileges and responsibilities. The usual expression for this type of society was '*compagnia*' or '*societas*,' and the firm was generally designated by the name of one of its members with the addition of the phrase '*et socii*,' or the like. It became an essential feature of this form of partnership that the partners were all of them responsible individually for the debts of the firm. At no time in Italy was the power of partners to bind by contract their fellow partners in practice denied. * * * But though a single partner could thus represent the firm, originally it was, as a rule, only in virtue of special procuration that he was privileged so to do. In the medieval contracts of partnership the partners often gave one another by procuration the right to represent and bind the firm. In the absence of such clauses in the contract, creditors of the firm for a debt contracted by an individual partner could in some places only make good their claim against the firm as a whole, if the debt had been recognized as a debt of the firm, as by entry in the firm's book, or employment of the money or goods for the common purposes of the firm. Simply in his capacity as partner a merchant had not everywhere in the early centuries of the Middle Ages a right to bind his copartners. * * *

"A third type of partnership, that of joint stock companies with the capital in the shape of freely alienable shares, with a liability limited to the amount of capital represented by the share, and with an administrative governing body composed of shareholders in which the majority decided, was in process of formation during the Middle Ages. * * * It was in Genoa that the first joint stock companies arose. * * * It would seem that joint-stock companies took their rise owing to colonial expansion in Italy at the close of the Middle Ages, and had spread to Holland, France and England by the 17th century."

Bibliographical.—Partnership has been treated by many writers—among English writers by Archbold, Bisset, Collyer, Dixon, Fox, Gow, Lindley, Pollock, Stark, and Watson; and among American writers by Bates, Parsons (Theophilus), Parsons (James), Rowley, and Story. There have been several American editions of Lindley.

Of books primarily for students, there are those of Professor Burdick, Professor Gilmore, Mr. Shumaker, and others. Of cases for the use of students, there are, among several, collections

by Professors Ames, Burdick, Gilmore, and Mechem, respectively. References to these collections will be found in the notes in this book.

(The references to Mechem's cases are to the third edition.)

The subject of Limited Partnership has also been treated by Mr. Bates, in a separate volume.

Codification.—In England, since 1890, and in several of our States the law of partnership has been, to a greater or less extent, reduced to the form of a statute. Thus there are the Field Code in California and some other western states; the Georgia Code; and the Louisiana Code. The most important of all American statutes upon the subject, however, is now the Uniform Partnership Act, drafted by Professor William Draper Lewis of the University of Pennsylvania, under the auspices of the National Conference of Commissioners on Uniform State Laws, and by them recommended to the several States for adoption. After long deliberation, in the course of which Professor James Barr Ames prepared a draft upon the so-called "entity theory," the Commissioners decided to proceed upon the opposite or so-called common law or aggregate theory.

The Act as drafted does not purport to be a complete body of Partnership law, but leaves many points untouched and, hence, as they were at common law.[5] It has already been adopted in a number of states. While, of course, it has no legal force except where it is so adopted, it is important and interesting everywhere as an approved statement of the law. A Uniform Limited Partnership Act has also been prepared in the same way. These Uniform Acts will be found in the Appendix, and the provisions of the Uniform Partnership Act are constantly referred to in

[5] Sec. 4, provides: "(1) the rule that statutes in derogation of the common law are to be strictly construed, shall have no application to this act; (2) The law of estoppel shall apply under this act; (3) The law of agency shall apply under this act; (4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it. (5) [Shall not affect existing contracts, rights or actions]."

"Sec. 5. In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern."

the text which follows. References to some of the current comments on the Act will be found in the foot note.[6]

[6] There are explanatory articles by Professor Lewis, in 24 Yale Law Journal, 617; by Professor Williston, in 63 University of Pennsylvania Law Review, 196; by Mr. James B. Lichtenberger, *id.*, 639; by Professor Moore, in 18 Columbia Law Review, 582, (this gives a very complete history of the preparation of the act); criticisms by Mr. Judson A. Crane, in 28 Harvard Law Review, 762; a reply by Professor Lewis, in 29 Harvard Law Review, 158, 291; a rejoinder by Mr. Crane, *id.*, 838; an historical review of the entity theory by Professor Drake, in 15 Michigan Law Review, 609; and a discussion of the general advisability of a Partnership Act by Professor Lewis, in 60 University of Pennsylvania Law Review, 93. Professor Lewis has also appended to the printed copies of the act elaborate notes as to the purpose and effect of the several sections.

THE LAW OF PARTNERSHIP

CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

§ 1. Partnership defined.—Partnership may be tentatively defined as a legal relation, based upon the express or implied agreement of two or more competent persons whereby they unite their property, labor or skill in carrying on some lawful business as principals for their joint profit. The English Partner-

ship Act declares that "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit." The American Uniform Partnership Act provides that "A partnership is an association of two or more persons to carry on as co-owners a business for profit." The persons so united are called *partners*. The term *copartnership* is sometimes used to designate the relation, and the term *copartners* to designate the parties. The partners collectively are often called the *firm*,[1] though in the older cases especially the word *firm* is used to designate the name under which the business is conducted.[2]

An attempt to frame a satisfactory definition of partnership is probably a somewhat hazardous undertaking. This is partly owing to the difficulty inhering in any attempt at definition, but it is chiefly attributable to the fact that the legal conception of partnership has not always been, nor is it wholly yet, clear and definite, and that the legal test for determining the existence of the relation has varied from time to time. Mr. Justice Lindley, in his admirable treatise upon the subject,[3] declines to attempt a definition, saying that to frame one "which

1 "The word 'firm' is a short, collective name for the individuals who constitute the partners, and the name under which they trade is their firm name. (Partnership Act, 1890. Sec. 4; the firm name is a mere expression, not a legal entity. Sadler v. Whiteman [1910], 1 K. B. 868, *per* Farwell, L. J., at p. 889, cited with approval. R. v. Holden [1912], 1 K. B. 483, C. C. A.) It is not the name of a corporation; it is a short name for X, Y and Z carrying on business in partnership. (*Re* Smith, Fleming & Co. (1879), 12 Ch. Div. 557, 567, C. A.) In English law, a firm is not a *persona*. (*Re* Sawers (1879), 12 Ch. Div. 522, C. A., *per* James, L. J., at p. 533; *Re* Vagliano Collieries (1910), 79 L. J. Ch. 769; compare *Re* Shand (1880), 14 Ch. D. 122, 126, C. A.) In Scotland a firm is a legal person distinct from the partners of which it is composed. Partnership Act, 1890, sec. 4 (2)." Halsbury, Laws of England, 22, p. 5. It is in this sense that the word *firm* is used in this book.

The partnership is also frequently called the "house," or the "concern."

2 According to the dictionaries this is an entirely proper use of the word *firm*, *i. e.*, as synonymous with name or style. See, also, McCosker v. Banks (1896), 84 Md. 292, 35 Atl. 935; *In re* Klein's Estate (1907), 35 Mont. 185, 88 Pac. 798; People v. Strauss (1901), 97 Ill. App. 47, 55.

3 Lindley on Partnership (Ewell's ed.), vol. I, p. 1.

shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition." He collects, however, no fewer than nineteen definitions which have been given by other writers; and some of the most important of these are reproduced in the foot-note.[4]

§ 2. Same subject—The characteristic elements.—These several definitions vary in minor particulars, but from them all at least the characteristic elements of partnership may be gathered. Thus—

1. It is an unincorporated association or legal relation.
2. It is created not by law but by the agreement of the parties.
3. It requires two or more competent parties.
4. It involves ordinarily the contribution by the members of money, property, skill, labor, credit, or the like, to constitute

[4] "A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit."—Bates.

"Partnership, as between the parties themselves, is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business or adventure."—Collyer.

"Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them."—Story.

"We define partnership as the combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit."—Parsons.

The latest editor of Mr. Parsons' book, Professor Beale, substitutes the following: "Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them."

See, also, the remarks of Sir George Jessel, M. R., in Pooley v. Driver (1876), Law Reports, 5 Ch. Div. 458, Ames' Cases 87; and the case of Queen v. Robson (1885), 16 Q. B. Div. 137, Mechem's Cases 1; Gilmore's Cases 85.

In popular parlance the word partner, or the colloquial "pardner," is frequently very loosely used.

the capital, stock, or foundation of the business. In the case of commercial partnership the contributions will usually be in property, money or credit; in industrial partnerships labor or service will usually be the contribution; while in professional partnership professional skill, standing or reputation may be the chief ingredient. As will be seen hereafter,[5] the several contributions need not all be of the same kind nor of the same amount or value. Though usual and often said to be essential, it seems not to be indispensable that *every* partner shall make a contribution.[6]

5. It contemplates the transaction of some lawful business, trade or occupation, in which the parties are to be co-owners and which they are to carry on as principals.

6. The purpose of the union is the pecuniary gain of the members.

In several of the definitions, partnership is spoken of as a contract. It is, however, rather the result of the contract than the contract itself; it is the relation or association which the contract creates.

§ 3. Partnership a commercial association.—Partnership in our modern English law is distinctively a *business* relation, and its object is the *pecuniary gain* of the members. This fact sharply differentiates it from a large class of associations organized for social, charitable, educational, religious or other similar purposes, such as social clubs, committees, lodges, fraternal societies, Christian associations, granges, and the like, of which something more will be said in a later section.[7]

[5] See *post*, § 136.

[6] Thus it is said by Jessel, M. R., in Pooley v. Driver (1876), 5 Ch. Div. 458, Ames' Cas. 87, "You can have, undoubtedly, according to English law, a dormant partner who puts nothing in,—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner, who contributes nothing at all,—neither name, nor skill, nor anything else. Therefore it is not quite accurate, as Chancellor Kent puts it, that they must contribute labor, skill or money, or some or all of them."

[7] An association organized, not for gain, but for the accomplishment of some social or religious purpose, as, for example, a Young Men's

In continental law the term partnership has often been applied more widely, including various forms of communal asso-

Christian Association, is not a partnership. Queen v. Robson (1885), 16 Q. B. Div. 137, Mechem's Partnership Cases, 1, Gilmore's Partn. Cas. 85. See, also, § 10, *post*.

Neither is a temporary mutual protective association: Burt v. Lathrop (1883), 52 Mich. 106, 17 N. W. 716, Mechem's Partn. Cas. 4; Gilmore's Partn. Cas. 57; nor a Masonic lodge: Ash v. Guie (1881), 97 Pa. 493, 39 Am. Rep. 818, Mechem's Partn. Cas. 721; Burdick's Partn. Cas. 30; or an association of "Knights of Labor": Brown v. Stoerkel (1889), 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430; nor a "provisional committee" organized to promote the formation of a railway company: Batard v. Hawes (1852), 2 El. & Bl. 287, Burdick's Partn. Cas. 33; nor a "grange": Edgerly v. Gardner (1879), 9 Neb. 130, 1 N. W. 1004; nor a rural telephone association: Meinhart v. Draper (1908), 133 Mo. App. 50, 112 S. W. 709; nor a religious communistic society, Teed v. Parsons (1903), 202 Ill. 455, 66 N. E. 1044. An association of pilots who prescribe rules regulating the order in which pilots shall serve, and who pool and divide the fees earned by each, is not a partnership. Guy v. Donald (1906), 203 U. S. 399, 51 L. ed. 245, 27 S. Ct. 63. An athletic association organized merely to promote athletic exercises by its members would not be a partnership, but if organized to give athletic or sporting exercises or games as a business for the profit of its members, it would be: Bennett v. Lathrop (1889), 71 Conn. 613, 42 Atl. 634, 71 Am. St. R. 222, Mechem's Partn. Cas. * 723. So may be an association of fruit growers organized to market the products of its members and engaged in the business of selling fruit, Briere v. Taylor (1905), 126 Wis. 347, 105 N. W. 817.

For similar reasons a defectively organized corporation will not be treated as a partnership if it was not organized for the purpose of carrying on a business for profit. Johnson v. Corser (1885), 34 Minn. 355, 25 N. W. 799.

An association merely to adjust, prevent or distribute the losses of a business would not be a partnership. Aigen v. Boston, etc., R. R. Co. (1882), 132 Mass. 423; Irvin v. Nashville, etc., R. Co. (1879), 92 Ill. 103, 34 Am. Rep. 116.

Mutual housekeeping arrangement not a partnership. Austin v. Thomson (1863), 45 N. H. 113.

Co-operative Business or Trading Associations. On the other hand, a co-operative association organized to carry on business for gain, would be a partnership—often a large one. If it were organized merely to save money, *e. g.*, to buy goods at wholesale and divide them among the members, it would not be a partnership. See § 13. But if organized to buy and sell goods for the profit of the members, it would be a partnership, even though lower prices were given to members than to non-members. Such partnerships are often organized with officers or managers to conduct the business, much like corporations. See Laney

ciation which would not be deemed partnerships with us.[8] Thus, a classification into *civil* and *commercial* partnerships is not infrequently found.

Judge Story, writing in 1841, and following Watson and Collyer, though with less precision, says that at common law partnerships are sometimes divided into two classes: (1) Private partnerships and (2) Public companies,[9] the latter of which are divided into incorporated and unincorporated, and are made to include several forms of association which would not now be regarded as partnerships at all.

§ 4. Is a contractual relation.—Partnership is a contractual relation and not a status.[10] It is created, limited, regulated and terminated, as between the parties themselves, by their contract or agreement. The law does not create partnership, or arbitrarily presume its existence.[11] As has been seen in the study of agency,[12] authority in one person to bind another as his agent

v. Fickel (1899), 83 Mo. App. 60, Mechem's Cas. 83; Atkins v. Hunt (1843), 14 N. H. 205, Mechem's Cas. 79; McFadden v. Leeka (1891), 48 Ohio St. 513, 28 N. E. 874, Mechem's Cas. 280; Carter v. McClure (1896), 98 Tenn. 109, 38 S. W. 585, 60 Am. St. R. 842, 36 L. R. A. 282, Burd. Cas. 37, Gilm. Cas. 108; Davison v. Holden (1887), 55 Conn. 103, 10 Atl. 515, 3 Am. St. R. 40; Farnum v. Patch (1880), 60 N. H. 294, 49 Am. Rep. 313; Hodgson v. Baldwin (1872), 65 Ill. 532; Schumacher v. Sumner Telephone Co. (1913), 161 Iowa 326, 142 N. W. 1034. Compare McDonald v. Fleming (1913), 178 Mich. 206, 144 N. W. 519. See also Joint Stock Companies, *post*, § 35.

8 See, for example, Maine's Village Communities.

9 Story on Partnership, § 76.

10 Bates on Partnership, vol. I, § 2. Mr. James Parsons, in his work on the Principles of Partnership (Boston, 1889), § 101, does indeed declare the contrary, distinguishing in this respect agency and partnership. Agency, he asserts, is not a status but a contractual relation, while partnership is the reverse. This is quoted, apparently with approval, in Haggett v. Hurley (1898), 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362. It is believed, however, that the two relations are alike contractual. See Holland's Jurisprudence, (10th ed.), 136.

11 Phillips v. Phillips (1863), 49 Ill. 437, Gilm. Cas. 113; *Re* Gibbs' Estate (1893), 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, Gilm. Cas. 91; Wilson v. Cobb (1877), 28 N. J. Eq. 177 (29 N. J. Eq. 361). Compare Phillips v. Phillips, *supra*, with Ratzer v. Ratzer (1877), 28 N. J. Eq. 136.

12 Mechem on Agency (2d ed.), § 29.

is sometimes said to be created by law or by necessity; but this is not true in the law of partnership. One individual may, it is true, be held liable, by estoppel, to particular persons as though he were a partner, but this liability, as will be seen hereafter,[13] is limited to those only in whose favor the estoppel operates, and does not make such individual an actual partner, nor amount to the general creation of a partnership between him and those with whom he was reputed to be associated. As a general rule there can be no partnership where the parties have not by their agreement created one.

A present partnership may be formed by the immediate act of the parties without any preliminary contract to do so. There may also be a present contract to form a partnership at some future time.

Contracts to enter into partnership rest upon the same foundations, such as consideration,[14] competency of parties, and the like, as other contracts.

Contracts of partnership need not be *express:* they may be implied from words or conduct as in other cases.[15]

§ 5. Is a voluntary relation—The delectus personarum.—It is necessary also to emphasize the voluntary character of the relation. The law does not choose partners for people. So intimate and confidential is the relation, so important and dangerous, if abused, are the powers of one partner to subject the others to liability, that the law leaves the choice of partners to the parties themselves, and does not attempt to force a partner upon another without the latter's consent. This right to choose one's own partner—the *delectus personarum,* as it is often called—is properly regarded as one of the most important characteristics of partnership.[16]

13 *Post,* § 103.

14 There must be consideration. Mitchell v. O'Neale (1869), 4 Nev. 504; though the mutual promises of the parties will suffice as in other cases.

15 See Davis v. Davis [1894], 1 Ch. 393, Burdick's Partn. Cas. 12.

16 See *post,* § 57.

§ 6. Is a partnership a distinct entity?—A partnership is sometimes said to be a distinct entity or legal person separate and distinct from the persons composing it as in the case of the corporation, but from a legal standpoint this can be true only in a limited sense.[17] For most purposes the common law

[17] This is partly a question of definition. The word *entity* is used in more than one sense. In the sense that a partnership is a distinct *group of persons*, whose legal rights, powers, duties, liabilities and disabilities are affected by the fact that they stand in that relation, a partnership is an entity. But in the sense that the partnership is a separate *legal person* having rights and liabilities of its own, distinct from those of all or any of the partners, a partnership is not, according to the generally prevailing view of English law, a distinct legal entity. "The law of England," says Sir Frederick Pollock, "knows nothing of the firm as a body or artificial person distinct from the members composing it, though the firm is so treated by the universal practice of merchants and by the law of Scotland. In England the firm name may be used in legal instruments both by the partners themselves and by other persons as a collective description of the persons who are partners in the firm at the time to which the description refers, and under the rules of the supreme court actions may now be brought by and against partners in the name of their firm. An action between a partner and the firm, or between two firms having a common member, was impossible at common law, and until 1891 it remained open to doubt whether such actions were possible since the judicature acts; but they are now expressly authorized by the rules of court. Nevertheless, the general doctrine that 'there is no such thing as a firm known to the law' remains in force." Digest of Law of Partnership (8th ed.), p. 23.

In Drucker v. Wellhouse (1888), 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328, it is said that, while a partnership is not a *person* it is an *entity*.

Persons are commonly classified as either *natural*, i. e. human beings, or *artificial*. "'Artificial', 'conventional', or 'juristic' persons," says Mr. Holland (Jurisprudence, 9th ed., p. 91), "are such groups of human beings or masses of property as are in the eye of the law capable of rights and liabilities, in other words to which the law gives a status. Such groups are treated as being persons, or as sustaining the mask of personality. They are of two kinds: (1) '*Universitates personarum*', such as the state itself; departments or parishes; collegia; churches. (2) '*Universitates bonorum*', such as funds left to 'pious uses' without a trustee. * * * So the estate of an intestate before administration; the estate of a bankrupt.

"Such juristic or artificial persons come into being when—(1) there exists a group of persons, or mass of property, as the case may be, and (2) the law gives to the group or mass in question the char-

regards only the individuals who occupy the relation; though by statute in many states the partnership itself is regarded by

acter of a person. * * * This may occur by means of either (*a*) a general rule, applicable wherever its conditions are satisfied, *e. g.* 'the Companies Act, 1862', (*b*) a special act of sovereign power, *e. g.* an incorporating statute or charter."

Professor Terry, Anglo-American Law, § 31, distinguishes between perfect artificial persons and imperfect ones. It is perfect when it is always treated as a person. "A true corporation, for example, is either a person or nothing. An imperfect artificial person is an entity that in law may be taken in its totality and in its relations to the external world in matters which might fall within the scope of its personality as a person for some purposes but not for all. Thus, by statute, a partnership may in most places sue and be sued by its partnership name, and the execution in a judgment obtained against it in such a suit must be levied on the partnership property only. But a partnership for most purposes is not a person."

Partnership, in English law and generally in our American law, is the natural persons who compose the group, and the group is not an artificial or juristic person made up from those natural persons. See Brown v. Hartford F. Ins. Co. (1875), 117 Mass. 479, Gilm. Cas. 151; Haskins v. D'Este (1882), 133 Mass. 356, Gilm. Cas. 154.

In a number of foreign jurisdictions, partnership is declared by the Code, or otherwise held, to be a juristic person.

Considerable advocacy of this view is also to be found in the United States. See, *e. g.*, "The Firm as a Legal Person", Cowles, 57 Central L. Jour. 343; "The Partnership as a Legal Entity", Brannan, 17 Harvard L. Review, 207; "The Uniform Partnership Act", Crane, 28 Harvard L. Review, 762; "The Uniform Partnership Act and Legal Persons", Crane, 29 Harvard L. Review, 838. The draft for the Uniform Partnership Act submitted by Professor Ames (though not finally adopted) was prepared upon this theory.

(But compare the article by Professor Drake, in 15 Michigan Law Review 609).

There are many cases containing *dicta* to the same effect. See, *e. g.* Roop v. Herron (1883), 15 Neb. 73, 17 N. W. 353; Rosenbaum v. Hayden (1888), 22 Neb. 744, 36 N. W. 147; Curtis v. Hollingshead (1834), 14 N. J. L. 402; Greenwood v. Marvin (1888), 111 N. Y. 423, 19 N. E. 228; Good v. Red River Valley Co. (1904), 12 N. Mex. 245, 78 Pac. 46; Allen v. Davids (1904), 70 S. Car. 260, 49 S. E. 846; Pierce v. Trigg (1839), 37 Va. (10 Leigh) 423; Jackson Bank v. Durfey (1895), 72 Miss. 971, 18 So. 456, 31 L. R. A. 470, 48 Am. St. Rep. 596, Mechem's Cas. 619 ("in equity"); Succession of Pilcher (1887), 39 La. Ann. 362, 1 So. 929, Gilm. Cas. 148.

In Iowa the partnership is said to be a distinct entity. See Fitzgerald v. Grimmell, *supra;* Lansing v. Bever Land Co. (1913), 158 Iowa 693, 138

the law as a distinct entity for a few special purposes, as in the case of taxing acts, acts providing for the filing of chattel mortgages, and, occasionally, acts permitting process to run against the partnership as such.[18] In most other cases, when the partnership is spoken of as a separate, legal entity, having its own property, creditors and the like, little more is meant as a legal proposition than that the partners as such have special rights and liabilities which are worked out through their partnership relation.[19]

N. W. 833, citing many other Iowa cases. So, in Louisiana: Newman v. Eldridge (1901), 107 La. 315, 31 So. 688.

Contra. "Has never been recognized" in Illinois: Abbott v. Anderson (1914), 265 Ill. 285, 106 N. E. 782, Ann. Cas. 1916 A. 741, L. R. A. 1915 F, 668; "It is not a person, either natural or artificial": Adams v. Church (1902), 42 Oreg. 270, 70 Pac. 1037, 59 L. R. A. 782, 95 Am. St. R. 740; "A partnership is not like a corporation. It has no independent existence." *Matter* of Peck (1912), 206 N. Y. 55, 99 N. E. 258, 31 Ann. Cas. 798, 41 L. R. A. (N. S.) 1223. "The inaccuracy and impropriety of such nomenclature was so clearly and repeatedly demonstrated as to lead to its substantial abandonment": Loomis v. Wallblom (1905), 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, Gilm. Cas. 584.

18 See Ricker v. American L. & T. Co. (1885), 140 Mass. 346, 5 N. E. 284; Faulkner v. Hyman (1886), 142 Mass. 53, 6 N. E. 846; Hubbardston Lumber Co. v. Covert (1877), 35 Mich. 254, Gilm. Cas. 148; Williams v. Hurley (1902), 135 Ala. 319, 33 So. 159; Robertson v. Corsett (1878), 39 Mich. 777; Fitzgerald v. Grimmell (1884), 64 Iowa 261, 20 N. W. 179; Walker v. Wait (1878), 50 Vt. 668.

Compare West v. Valley Bank (1856), 6 Ohio St. 169.

19 In Meehan v. Valentine (1891), 145 U. S. 611, 12 S. Ct. 972, 36 L. ed. 835; Mechem's Cas. 135, Gilm. 45, the court, referring to the case of Pooley v. Driver (1876), L. R. 5 Ch. Div. 458, Ames' Cas, 87, says: "In the case last above cited Sir George Jessel said: 'You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity.' And in a very recent case the court of appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. Bank of Buffalo v. Thompson, 121 N. Y. 280," 24 N. E. 473, Burd. Cas. 286, Gilm. Cas. 152.

It is true that there are points in the law of partnership at which the adoption of the entity theory, or the rule of corporation law, would simplify the problem, and it is this fact which has made that theory so attractive. The general adoption of that theory, however, would amount practically to the abolition of partnerships and the substitution of a more or less crude type of corporations. The English Partnership Act does not adopt it, and the American Uniform Partnership Act has wisely been framed upon the common law theory.

In general, it is true in our law that natural persons cannot transform themselves into, or create from themselves, a juristic or legal person by their own act alone and without the declared authority or consent of the state.

The United States Bankruptcy Act of 1898 does undoubtedly to a limited extent treat the partnership as an entity, but the somewhat extreme views, as to the effect of this statute, announced by some of the circuit and district courts have been disapproved by the United States Supreme Court.[20]

§ 7. Same subject—The commercial conception of partnership.—The ordinary commercial conception of a partnership is undoubtedly different from that of the common law. "Commercial men and accountants," says Mr. Justice Lindley, "are apt to look upon a firm in the light in which lawyers look upon a corporation, *i. e.*, as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts, the *firm* is made debtor to each partner for what he brings into the

But see People v. Coleman (1892), 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; *Matter* of Peck (1912), 206 N. Y. 55, 99 N. E. 258, 31 Ann. Cas. 798, 41 L. R. A. (N. S.) 1223; Jones v. Blun (1895), 145 N. Y. 333, 39 N. E. 954, Gilm. Cas. 150.

See also Professor Drake's article in 15 Michigan Law Review, 609, as to this *dictum* of Sir George Jessel.

20 See Francis v. McNeal (1913), 228 U. S. 695, 33 Sup. Ct. 701, 57 L. ed. 1029 (aff'g 108 C. C. A. 459, 186 Fed. 481), expressing the preference of that court for the views of Vaccaro v. Security Bank of Memphis (1900), 43 C. C. A. 279, 103 Fed. 436, over those of *In re* Bertenshaw (1907), 85 C. C. A. 61, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986, where the majority of the court emphasized the entity theory.

common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm. * * * The partners are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets. But this is not the legal notion of a firm. The firm is not recognized by lawyers as distinct from the members composing it."[31]

Though the legal and the mercantile views are thus distinct, there is in many quarters a tendency to incorporate the mercantile conception in the legal theory as largely as the inherent nature of the partnership will permit. When not carried be-

[31] Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 110.

But there is great practical difficulty in completely adopting the mercantile theory. Thus in *Ex parte* Beauchamp (1894), 1 Q. B. 1, where a receiving order in bankruptcy had been made against a firm composed of an adult and an infant, Kay, L. J., said: "The receiving order is made against the firm, and the case has been argued as though the firm had a separate existence as distinguished from the individual members of the firm; in other words, as if it were a corporation having a separate existence from the individuals which compose it. It is no such thing, and the rules (permitting proceedings in the firm name) do not mean anything of the kind. Under the rules, facilities have been given for proceeding against a firm in the firm name, for this simple reason—that it is not always easy to find out who are the partners in a firm." (See, also, *Ex parte* Corbett (1880), 14 Ch. D. 122; Drucker v. Wellhouse (1888), 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328; Harris v. Visscher (1876), 57 Ga. 229; Chambers v. Sloan (1855), 19 Ga. 84; Adams v. Church (1902), 42 Oreg. 270, 70 Pac. 1037, 95 Am. St. R. 740, 59 L. R. A. 782; Wiggins v. Blackshear (1894), 86 Tex. 665, 26 S. W. 939.) So in a late case in New York—Jones v. Blun (1895), 145 N. Y. 333, 39 N. E. 954—the court, notwithstanding what was said in Bank of Buffalo v. Thompson, *supra,* points out that it is only for certain purposes that the partnership may be regarded as an entity. See, also, Matter of Peck (1912), 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, and the remarks of Holmes, J., at the end of his opinion in Hallowell v. Blackstone Bank (1891), 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315.

yond the bookkeeping aspect the tendency is harmless enough, and though the practical consequences of the changed conception are usually not pronounced, it often aids in a clearer conception of the relative rights and powers of the partners collectively and the partners as individuals.

So in a recent case before the Supreme Court of the United States,[22] it was said by Justice Holmes: "Since Cory on Accounts was made more famous by Lindley on Partnership the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations, and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshalling of assets. The nature of the liability is determined by the common law."

§ 8. How a partnership differs from a corporation.—A partnership differs in material respects from a corporation.

A partnership is a voluntary, unincorporated association of individuals whose legal relation is based upon their agreement, and needs no special statutory authority to give it force and effect. They continue to act in this relation as individuals. In the absence of a statute, they sue and are sued only in their individual names. The death of one operates usually to terminate the relation. The transfer of the interest of one has usually the same effect, and operates, not to introduce the transferee into the relation, as a party to it, but merely to give him such share as his transferrer would have upon a dissolution. Each partner is, in general, personally and directly responsible for all the debts of the partnership, notwithstanding that he has fully paid in his agreed contribution.

A corporation, on the other hand, is a distinct legal entity,

[22] Francis v. McNeal (1913), 228 U. S. 695, 33 Sup. Ct. 701, 57 L. ed. 1029.

created by some express legislative authority, either special to the particular case or general in like cases. It acts in its corporate capacity only, without regard to the individuals who compose it. It may sue and be sued in its own name. The death of one or more corporators does not dissolve it. One corporator may transfer his share without affecting the corporate existence, and his transferee may take his place in the corporation, which proceeds without regard to changes in the *personnel* of the corporators. One corporator, having paid his subscription, is not usually subject to any further personal responsibility for the debts of the concern unless some statute imposes such a responsibility. In these characteristics of limited liability, facility of transfer, and immunity from dissolution by death, are found the leading inducements to the formation of corporations.

§ 9. **Intermediate associations.**—In many of the states, statutes have provided for the organization of associations partaking more or less of the characteristics of both partnerships and corporations. Thus, there are *joint-stock companies*, which usually are simply partnerships with transferable shares;[23] *partnership associations, limited,* which are usually but a crude form of corporation; and *limited partnerships,* which are partnerships having one or more general members subject to the usual liabilities of partners, and also one or more special partners whose liability is limited to the amount contributed. The legal peculiarities of these several types will be more fully considered in later chapters. In a considerable number of States there are constitutional provisions that associations having any of the characteristics of corporations not possessed by ordinary partnerships shall, for many purposes, be deemed to be corporations.

§ 10. **Clubs, societies, etc.**—In addition to these are other bodies, not statutory, and not organized for the purpose of pecuniary profit, which it is sometimes sought to hold liable as partnerships, but which are not such in fact. Of these the unin-

[23] While joint stock companies are usually provided for by statute, a partnership with transferable shares may be created by the contract of the members. See Phillips v. Blatchford (1884), 137 Mass. 510.

corporated social clubs, committees, lodges, fraternal societies, Christian associations, granges and many co-operative associations, are common examples. Such bodies are not engaged in *business*, are not organized for pecuniary profit, and are therefore ordinarily not partnerships, nor is the liability of a member to be determined by the law of partnership, but by that of principal and agent—those, and those only, being liable as principals who have expressly or impliedly authorized acts to be done in their behalf, or who have subsequently ratified them.[24]

Of course, if such a body were actually engaged in carrying on a business with a view to profit, it would ordinarily be deemed to be a partnership.

§ 11. Joint-tenancy and co-ownership.—Joint-tenants and tenants in common are not thereby partners.[25] While they have some similarities,[26] they differ in many particulars, of which the following are the most important:

24 Flemyng v. Hector (1836), 2 Mees. & Wels. 172; Todd v. Emly (1841), 7 id. 427; *S. C.*, 8 id. 505; Lafond v. Deems (1880), 81 N. Y. 507; Eichbaum v. Irons (1843), 6 Watts & Serg. (Pa.) 68, 40 Am. Dec. 540; Ash v. Guie (1881), 97 Pa. 493, 39 Am. Rep. 818, Mechem's Cas. on Partn. 721, Burd. Cas. 30; Davison v. Holden (1887), 55 Conn. 103, 10 Atl. 515, 3 Am. St. R. 40; Burt v. Lathrop (1883), 52 Mich. 106, Mechem's Cas. on Partn. 4.

See many other cases cited, *ante*, § 3.

25 See 1 Lindley on Partn. (Ewell's 2d Am. ed.), p. 52; Dunham v. Loverock (1893), 158 Pa. 197, 27 Atl. 990, 38 Am. St. R. 838, Mechem's Partn. Cas. 6; French v. Styring (1857), 2 Com. B, N. S. 357, Mechem's Partn. Cas. 765, Ames Cas. 41, Burd. Cas. 22; Goell v. Morse (1879), 126 Mass. 480, Mechem's Partn. Cas. 767, Burd. Cas. 23; Quackenbush v. Sawyer (1880), 54 Cal. 439, Mechem's Partn. Cas. 768, Burd. Cas. 25, Gilm. Cas. 66; Oliver v. Gray (1842), 4 Ark. 425, Burd. Cas. 16; Logan v. Oklahoma Mill Co. (1904), 14 Okla. 402, 79 Pac. 103, Gilm. Cas. 61; Sikes v. Work (1856), 6 Gray (Mass.) 433. Compare Fleming v. Fleming (1919), — Iowa —, 174 N. W. 946.

Many other cases are cited, *post*, § 83.

26 Partnership and joint tenancy have each a form of survivorship, but while that of joint tenancy is absolute, that of partnership is qualified and, in a sense, fiduciary. See *post*, § 402-3. Tenancy in common bears a closer resemblance, and the two relations, especially in the case of property in land, are often quite closely assimilated.

1. Co-ownership is not necessarily the result of an agreement to create it,[27] while partnership is.[28]

2. Co-ownership does not necessarily involve community of profit or loss,[29] while partnership does.[30]

3. One co-owner may, without the consent of the others, assign his interest in such a way that his assignee will assume his relations to the other co-owners,[31] but one partner cannot do this.[32]

4. One co-owner is not as such the agent of the others,[33] while a partner is.[34]

5. One co-owner has no lien on the common property for expenses or outlays, or for what may be due from the others as their share of a common debt,[35] while a partner has such a lien.[36]

Other distinctions exist, but these are sufficient to illustrate the differences.

§ 12. ——But while the legal distinction between partnership and co-ownership as such is thus clearly defined, it is possible that the co-owners may so deal with their common property as to assume very nearly, if not entirely, the attitude of partners. Thus, when they employ it in business with a view to profit, and divide such profits between them, partnership may result.[37] Even the division of the gross proceeds of the employment of their common property was formerly deemed sufficient to render them liable as partners, though this view is now generally abandoned, as will be seen in a later section.[38] Until, however, it appears that they have changed their position to that of partners, their relation as co-owners will be presumed to continue; and he who asserts that the change has taken place has the

They differ, nevertheless, in many important respects as will be seen in the text. See, also, *post*, § 163.

27 Lindley on Partnership, *supra.*

28 See *ante*, § 4; *post*, § 72.

29 Lindley, *ubi supra.*

30 See *post*, §§ 75-77.

31 Lindley, *ubi supra.*

32 See *post*, § 57.

33 Lindley, *supra.*

34 See *post*, § 244.

35 Lindley, *supra;* Goell v. Morse, *supra.*

36 See *post*, § 431.

37 See *post*, § 83; Butler Savings Bank v. Osborne (1893), 159 Pa. 10, 28 Atl. 163, 39 Am. St. R. 665, Gilm. Cas. 58; Noyes v. Cushman (1853), 25 Vt. 390, Gilm. Cas. 65.

38 See *post*, §§ 86, 87.

burden of proving it, and he can not do it merely by evidence of facts which are as consistent with the continuance of the old relation as with the formation of a new one.[39]

The Uniform Partnership Act recognizes the distinction between co-ownership and partnership. It provides that "joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property."[40]

§ 13. Joint purchasers of goods, etc., for division, use, etc.—Persons who unite to purchase goods or other property for the purpose of dividing the property specifically between themselves are not thereby rendered partners.[41] Neither are they where they merely purchase the property for use,[42] unless, indeed, the use constitutes their business,[43] or it is purchased for use in a business which is carried on in partnership.[44]

§ 14. Joint purchasers of goods, etc., for resale.—If several persons jointly purchase goods or other property in a particular instance for resale, with a view to divide the profits arising from the transaction, a partnership *may* thereby be created,[45] though it is not *necessarily* so. Even though they purchase for the purpose of resale, their agreement may show that no general

[39] Dunham v. Loverock, *supra;* Butler Savings Bank v. Osborne, *supra.*

[40] Sec. 7, subdiv. 2.

[41] See Coope v. Eyre (1788), 1 H. Black. 37, Mechem's Cas. 96; Hoare v. Dawes (1780), 1 Doug. 371, Ames Cas. 4, Burd. Cas. 1, Gilm. Cas. 1; Gibson v. Lupton (1832), 9 Bing. 297; Logan v. Oklahoma Mill Co. (1904), 14 Okla. 402, 79 Pac. 103, Gilm. Cas. 61; Morse v. Pacific Ry. Co. (1901), 191 Ill. 356, 61 N. E. 104.

[42] See Helme v. Smith (1831), 7 Bing. 709, Ames Cas. 35, Burd. Cas. 21, Gilm. Cas. 84; Rocky Mt. Stud Farm Co. v. Lunt (1915), 46 Utah 299, 151 Pac. 521 (farmers uniting to buy horse for use in breeding).

[43] See Noyes v. Cushman (1853), 25 Vt. 390, Gilm. Cas. 65; State National Bank v. Butler (1894), 149 Ill. 575, 36 N. E. 1000.

[44] See Davis v. Davis, [1894] 1 Ch. 393.

[45] Reid v. Hollinshead (1825), 4 Barn. & Cr. 867, Ames' Cas. 29; Jones v. Davies (1899), 60 Kan. 309, 56 Pac. 484, 72 Am. St. R. 354; Moore v. Thompson (1919), — Kan. —, 184 Pac. 980.

or commercial partnership was intended,[46] as where they expressly deny to each the ordinary attributes of partnership, such as the power of either to sell or incur indebtedness without the concurrence of the other;[47] and a single, isolated, casual purchase of land or chattels, by persons not otherwise partners, with a view, not to *deal* in the property as a *business,* but merely to hold it until it can be sold at an advance, can rarely be deemed to create a partnership.[48] And this is true even though it is agreed that there may be partnership in a single adventure.[49] The nature of the contract, the situation and attitude of the parties, and the circumstances of the purchase must determine the question. Many of the cases are confessedly difficult to distinguish. It is to this class of transactions that the term "joint venture," referred to in a following section,[50] is frequently applied.

§ 15. Workmen dividing product or proceeds.—For reasons similar to those referred to in the preceding sections, the fact

46 Thus it is said in Williams v. Gillies (1878), 75 N. Y. 197, "Conceding a community of interest, and *in some sense* a partnership, it does not follow that all the incidents and liabilities of a commercial partnership attach. The transaction must be construed with reference to the character of the property and the legal rules applicable to it." See, also, Jones v. Gould (1913), 209 N. Y. 419, 103 N. E. 720.

47 Goell v. Morse (1879), 126 Mass. 480, Mechem's Cas. 767, Burd. Cas. 23. Here two men bought a horse for the purpose of resale at a profit, but it was agreed that either one who should have possession of the horse should feed him at his own expense, and though each was to endeavor to find a purchaser, neither was to sell without the concurrence of the other. They were held to be tenants in common and not partners. Compare French v. Styring (1857), 2 Com. B. (N. S.) 357, Mechem's Cas. 765, Ames' Cas. 41, Burd. Cas. 22; Quackenbush v. Sawyer (1880), 54 Cal. 439, Mechem's Cas. 768, Burd. Cas. 25, Gilm. Cas. 66.

48 See Clark v. Sidway (1891), 142 U. S. 682, 35 L. ed. 1157; 12 S. Ct. 327; Bruce v. Hastings (1867), 41 Vt. 380, 98 Am. Dec. 592; Farrand v. Gleason (1884), 56 Vt. 633, Burd. Cas. 27; Jones v. Gould (1913), 209 N. Y. 419, 103 N. E. 720; Sutton v. Mo., etc., Ry. Co. (1919), 104 Kan. 282, 178 Pac. 418; Jackson v. Hooper (1909), 76 N. J. Eq. 185, 74 Atl. 130 (but see case reversed and held on different theory, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658 and many other cases cited, *post,* § 16.

49 *Post,* § 43.

50 *Post,* § 16.

that two or more workmen, who are not otherwise partners, unite, in a particular instance, to do a piece of work and to divide the thing made, or to sell the product and divide the proceeds, does not of itself constitute them partners.[51] It is not done as a *business* with a view to *profit.* Thus if two men go fishing together and divide the catch;[52] if one man furnishes a farm and another furnishes the seed and labor to raise a crop which they divide between them;[53] if a wheelwright and a blacksmith unite to make and iron a wagon, and then sell it and divide the price, they are not thereby constituted partners either in the particular adventure or in such ventures generally. Many further illustrations will be given in a later section.[54]

§ 16. Joint ventures—Syndicates.—Other cases of particular and peculiar contracts for associated enterprise occasionally present themselves, usually in connection with the purchase, for ultimate sale or division, of a particular piece of property.[55] In several modern cases a tendency to distinguish them by the name of "joint ventures" has been manifested,[56] though this

[51] Two lawyers, not partners, who take a particular case together and agree to divide the fees, do not thereby become partners: Willis v. Crawford (1901), 38 Oreg. 522, 64 Pac. 866, 53 L. R. A. 904.

See cases of men jointly doing a job of lumbering: Dwinel v. Stone (1849), 30 Me. 384, Burd. Cas. 17; McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583; Dutcher v. Buck (1893), 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776, Mechem's Cas. 749.

[52] See Hurley v. Walton (1872), 63 Ill. 260; Baxter v. Rodman (1826), 20 Mass. (3 Pick.) 435; Cambra v. Santos (1919), — Mass. —, 123 N. E. 503.

[53] See Reynolds v. Pool (1881), 84 N. Car. 37, 37 Am. Rep. 607; Day v. Stevens (1883), 88 N. C. 83, 43 Am. Rep. 732; Putnam v. Wise (1841), 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Donnell v. Harshe (1877), 67 Mo. 170, Gilm. Cas. 63; Blue v. Leathers (1853), 15 Ill. 31; Logan v. Oklahoma Mill Co. (1904), 14 Okla. 402, 79 Pac. 103; Cherry v. Strong (1895), 96 Ga. 183, 22 S. E. 707, Burd. Cas. 28; Kelly v. Summerfield (1903), 117 Wis. 620, 94 N. W. 649, 98 Am. St. R. 951; Wagner v. Buttles (1913), 151 Wis. 668, 139 N. W. 425, Ann. Cas. 1914 B, 144; Cedarberg v. Guernsey (1899), 12 S. Dak. 77, 80 N. W. 159; Williams v. Rogers (1896), 110 Mich. 418, 68 N. W. 240.

[54] See *post*, § 83.

[55] See *ante*, § 14.

[56] See Jones v. Gould (1913), 209 N. Y. 419, 103 N. E. 720; Ross v.

name is not particularly illuminating. They are also sometimes called "syndicates," but this name is not more distinguishing than the other. They frequently have *some* of the characteristics of partnership, but they are usually not partnerships, at least of the commercial or trading class,[57] and the rights and liabilities of the parties, where there are no elements of estoppel, are to be worked out by a consideration of the terms of the contract and of the powers and authorities in fact conferred.[58] The implied authority of the associates to bind each other by contracts is usually very limited.[59] Persons so situated who have acquired property which they are to hold until they unite in disposing of it do not usually contemplate or require any acts of agency by one; there are ordinarily no incidental contracts

Burrage (1919), — Mass. —, 124 N. E. 267.

The term "joint adventure" seems to be also used, as in Butler v. Union Trust Co. (1918), 178 Cal. 195, 172 Pac. 601; Jackson v. Hooper (1909), 76 N. J. Eq. 185, 74 Atl. 130 (reversed and put on different theory, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658); Keyes v. Nims (1919), — Cal. —, 184 Pac. 695; McCarney v. Lightner (1920), — Iowa —, 175 N. W. 751; Thimsen v. Reigard (1920), — Oreg. —, 186 Pac. 559.

57 Thus in Butler v. Union Trust Co., *supra*, the court says: "It is sometimes a close question whether a transaction constitutes a partnership or a joint adventure."

58 That no partnership resulted, in the particular case, see Butler v. Union Trust Co., *supra;* Jackson v. Hooper, *supra;* Jones v. Gould, *supra;* Clark v. Sidway (1891), 142 U. S. 682, 35 L. ed. 1157, 12 S. Ct. 327; Farrand v. Gleason (1884), 56 Vt. 633, Burd. Cas. 27; Central Trust Co. v. Creel (1919), 184 Ky. 114, 211 S. W. 421; Bruce v. Hastings (1868), 41 Vt. 380, 98 Am. Dec. 592, Gilm. Cas. 71; Gottschalk v. Smith (1895), 156 Ill. 377, 40 N. E. 937; Wade v. Hornaday (1914), 92 Kan. 293, 140 Pac. 870; Coward v. Clanton (1898), 122 Cal. 451, 55 Pac. 147.

Calling the associates partners, see Kayser v. Maugham (1885), 8 Colo. 232, 6 Pac. 803; Jones v. Davies (1899), 60 Kan. 309, 56 Pac. 484, 72 Am. St. R. 354; Spencer v. Jones (1899), 92 Tex. 516, 50 S. W. 118, 71 Am. St. R. 870; Yeoman v. Lasley (1883), 40 Ohio St. 190; Hulett v. Fairbanks (1883), 40 Ohio St. 233; Mitchell v. Tonkin (1905), 109 N. Y. App. Div. 165, 95 N. Y. S. 669; Canada v. Barksdale (1881), 76 Va. 899; Torbert v. Jeffrey (1900), 161 Mo. 645, 61 S. W. 823; Phillips v. Reynolds (1908), 236 Ill. 119, 86 N. E. 194.

Calling the arrangement a "pool," see Green v. Higham (1900), 161 Mo. 333, 61 S. W. 798.

59 See Jones v. Gould, *supra;* Keyes v. Nims, *supra.*

to be made; the parties intend to act unitedly when they act at all; and consequently there is no ground for implying any general authority in one to act for all. Only the consent of all, or the rare case of overpowering necessity, would create an authority.

In most other respects their relation is governed by the ordinary rules of partnership,[60] though there is unfortunately much apparent conflict in the cases.

§ 17. Members of defectively-organized corporations.— Whether persons are to be held liable as partners who have engaged in business in pursuance of an unsuccessful attempt to organize a corporation is a question which presents many difficulties and upon which the authorities are in conflict. It is contended, on the one hand, that where the association has done business and entered into contracts as a corporation, the individuals composing it cannot, in case it appears that no cor-

[60] Thus in Butler v. Union Trust Co., *supra*, the court said: "A joint adventure is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor, and the obligations growing out of such agreement between the parties are governed by the same rules of law, Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076; Causten v. Barnette, 49 Wash. 659, 96 Pac. 225; Claflin v. Gross, 50 C. C. A. 300, 112 Fed. 386, whether the parties were technically partners or not, an accounting was necessary to determine their respective rights, Garr v. Redman, 6 Cal. 574." Same in substance: Marston v. Gould (1877), 69 N. Y. 220. (But in Clark v. Sidway, *supra*, it is held that one associate can sue another at law for reimbursement for advances, and is not obliged to resort to equity.)

That the same rules of good faith and loyalty apply here as in partnership: Jackson v. Hooper, *supra;* Thimsen v. Reigard, *supra*. See, also, Hulett v. Fairbanks, *supra;* Stem v. Warren (1919), 185 N. Y. App. Div. 823, 174 N. Y. Supp. 30. See also Central Trust Co. v. Creel (1919), 184 Ky. 114, 211 S. W. 421; Selwyn v. Waller (1914), 212 N. Y. 507, 106 N. E. 321.

In National Surety Co. v. Winslow (1919), — Minn. —, 173 N. W. 181, it is said: "In the absence of express limitations in that respect each party to such adventure is subject to all losses and liabilities, and entitled to share equally in the profits of the undertaking. The relationship is substantially that of a copartnership."

As to contribution to losses among themselves, see Stettauer v. Carney (1878), 20 Kan. 474.

See discussion in 33 Harvard L. Review, 852.

poration really existed, be personally liable, because they have never contracted as individuals or intended to be bound as such. To hold them liable as partners would be to hold them upon a contract which they never made or intended to make. On the other hand, it is contended that the parties must have intended to become liable in some way, and inasmuch as they have failed to bind themselves as a corporation, it must be assumed that they are liable as partners—that it is only through the fact that they are corporators and not partners that they escape personal liability; and hence if the corporate shield fails, the individual liability necessarily arises.

The matter, however, can not be so shortly disposed of, and a further investigation of the considerations involved is indispensable.

§ 18. —— As has already been seen, a corporation is, with us, the creature of statute, and without such a statute the corporation can not ordinarily exist. The statutes providing for the organization of corporations usually prescribe a variety of acts to be done by the proposed incorporators with a view to regularity, safety and publicity. If all of these requirements are properly complied with a valid and unimpeachable incorporation will ordinarily result,—what is often described as a corporation *de jure*.

Not all of the requirements of such a statute, however, will necessarily be rated as of the same value or importance. Some of the provisions may be merely directory rather than mandatory. Certain of them may look merely to order and regularity, rather than to the protection of the substantial interests of the parties or the public. The state, of course, may insist upon a compliance with all of them; but it does not follow that private individuals may do the same where no substantial interest of their own is affected by the non-compliance. Public interest may require that corporate bodies, existing in fact, in pursuance of a genuine attempt to comply with the state's requirements, shall be recognized by private individuals as corporations until the state sees fit to interfere, even though such attempt at compliance be not in all respects complete and perfect. Such a body may be called a corporation *de facto*. It may be compared to

the officer *de facto,* whose acts, so far as private individuals are concerned, are regarded as official, even though his title to the office may not be perfect, if he be, nevertheless, permitted to exercise the functions of the office with public acquiescence or approval.[61]

§ 19. —— The corporation *de facto* is a legal institution, like the officer *de facto.* It arises from the policy of the law, and, though elements of estoppel are usually to be found in the cases in which it is recognized, it seems to be established that it is not dependent for its existence upon the application of that doctrine.[62] The essentials of a corporation *de facto* are ordinarily said to be three:—

1. The existence of a valid statute under which such a corporation as the one in question might lawfully be created. In some states, an apparently valid statute, *i. e.,* one not yet declared unconstitutional, answers this requirement.

2. An attempt at compliance with it, often characterized as "actual and *bona fide,*" but which should be colorable or apparent and *bona fide.*

3. A user or exercise of the corporate powers and functions which the statute contemplates.[63]

§ 20. Same subject—Causes of failure to incorporate.—The reasons why it is alleged that no valid incorporation has been effected may be numerous; but they commonly arrange themselves under one of three general heads: 1. The entire absence of an enabling statute. 2. The unconstitutionality of the statute relied upon. 3. The failure to comply with the requirements of a valid statute.

61 See Mechem on Public Officers, §§ 318, 319.

62 See Society Perun v. Cleveland (1885), 43 Ohio St. 481, 3 N. E. 357, 360.

63 Many statements of the conditions of a *de facto* corporation name but *two.* These are sometimes (1) a statute and (2) user. (*e. g.* American Loan & Trust Co. v. Minnesota, etc., R. Co. (1895), 157 Ill. 641, 42 N. E. 153; Methodist Church v. Pickett (1859) 19 N. Y. 482), and sometimes (1) a statute and (2) an attempt at compliance. That three conditions exist, see *In re* Gibbs' Estate (1893), 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, Gilm. Cas. 91.

§ 21. —— 1. **Where there was no statute at all.**—Cases of this sort are not very numerous, but they may arise where the parties mistakenly believe that a particular statute is in force within their jurisdiction, or where they mistakenly believe that an unquestioned statute is broad enough to cover the purpose for which they seek incorporation. In such a case, there can, of course, be no corporation *de jure;* neither, according to the generally accepted definition, can there be one *de facto,* since the first element, that of a valid statute, is lacking. Unless some estoppel or other bar can be raised, the members, notwithstanding all attempts at compliance and entire good faith, must be liable as partners.[64] Occasionally, though rarely, there will be found a naked assumption of corporate form without reference to any statute.

§ 22. —— 2. **Where a statute, apparently valid, was unconstitutional.**—It not infrequently happens that parties comply in all respects with a statute, apparently valid, but which is subsequently held to be unconstitutional. In such a case, there can clearly be no corporation *de jure.* Whether there can be one *de facto* is in dispute. It is said, on the one hand, that an unconstitutional statute is no statute, it never was a statute, it was void from the beginning, and therefore the first essential for a corporation *de facto,* namely, a statute, is lacking. According to this view, the members must be liable as partners, unless some estoppel or other bar can save them. On the other hand, it is urged that, since every one is entitled if not bound to believe that the legislature has not exceeded its constitutional

[64] See Davis v. Stevens (1900), 104 Fed. 235, Mechem's Cas. 724 (no law); American L. & T. Co. v. Minnesota, etc., R. Co. (1895), 157 Ill. 641, 42 N. E. 153 (no law); Mandeville v. Courtright (1906), 73 C. C. A. 321, 142 Fed. 97, 6 L. R. A. (N. S.) 1003 (statute did not cover purpose contemplated); Vredenburg v. Behan (1881), 33 La. Ann. 627 (same). *Cf.* Bradley v. Reppell (1895), 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. R. 685 (law had expired); Sturges v. Vanderbilt (1878), 73 N. Y. 384 (same). In Empire Mills v. Alston Grocery Co. (1891), 4 Willson (Tex. Civ. App.) 221, 15 S. W. 200, 12 L. R. A. 366, it was said that where a corporation was organized in one state to do *all* its business in another, its shareholders in the latter state would be liable as partners; *sed quere.*

powers, persons who in good faith rely upon an apparently valid statute, which they find upon the statute book, not yet declared unconstitutional, should be protected as against all attacks, except a direct attack by the state itself. Although the weight of authority seems to be with the former view,[65] the latter is not without substantial support.[66]

§ 23. —— 3. Where a valid statute is defectively complied with.—Where there is a valid statute, and the only defect complained of is in the manner of complying with it, a different question is presented. The non-compliance may run through all degrees from a practically complete compliance to a practical failure or omission to comply at all. A perfect compliance, of course, will make a corporation *de jure*. So will a substantial compliance with all of the requirements.[67] Even the state will

[65] See Eaton v. Walker (1889), 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102, Mechem's Cas. 8; Brandenstein v. Hoke (1894), 101 Cal. 131, 35 Pac. 562; Clark v. American Cannel Coal Co. (1905), 165 Ind. 213, 73 N. E. 1083, 112 Am. St. R. 217; Huber v. Martin (1906), 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 115 Am. St. R. 1023.

[66] See Richards v. Minnesota Savings Bank (1899), 75 Minn. 196, 77 N. W. 822; Gardner v. Minneapolis, etc., Ry. Co. (1898), 73 Minn. 517, 76 N. W. 282; Catholic Church v. Tobbein (1884), 82 Mo. 418; Coxe v. State (1895), 144 N. Y. 396, 39 N. E. 400; Mayor v. Manhattan Ry. Co. (1894), 143 N. Y. 1, 37 N. E. 494; Winget v. Building Ass'n (1889), 128 Ill. 67, 21 N. E. 12.

[67] Certain of the cases declare that there must be a "substantial" compliance with the formalities, or a compliance in all "material respects." Kaiser v. Lawrence Savings Bank (1881), 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85, Mechem's Cas. 16; Mokelumne Hill Mining Co. v. Woodbury (1859), 14 Cal. 424, 73 Am. Dec. 658; Hurt v. Salisbury (1874), 55 Mo. 310; Bigelow v. Gregory (1874), 73 Ill. 197, Gilm. Cas. 104. But, as is pointed out in *Re* Gibbs' Estate (1893), 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, "where there has been a substantial compliance with the law, the corporation is, of course, *de jure*." So, in Finnegan v. Noerenberg (1893), 52 Minn. 239, 53 N. W. 1150, 38 Am. St. R. 552, 18 L. R. A. 778, Mechem's Cas. 13, the court say: "A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such an apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body from being a corporation *de jure*; but, if there be user pursuant to such attempted organization, it will

not insist upon more than that. Less than that high degree of compliance which constitutes the corporation *de jure,* is that which will constitute a corporation *de facto,* the members of which are not liable as partners. Just what degree of compliance is necessary to create a corporation *de facto,* is not easy to state. Some courts have been exceedingly strict in their requirements.[68] Others have been more liberal.[69] Many statements of the rule have been attempted. It is often said that "an actual and *bona fide* attempt" will suffice. What is requisite, however, is a *colorable* or *apparent* attempt—something in pursuance of the scheme of the statute tending to give publicity or openness to the claim of corporate character. They must also go so far in organizing as to secure to the corporation the substance of assets, subscriptions, etc., which it would have had if regular. Perfect articles of association kept in the pocket are less potent in creating a corporation *de facto* than much less perfect ones duly filed or recorded as the statute requires.

not prevent it being a corporation *de facto.*" The statute may, however, make strict compliance with some or all of the requirements a condition precedent to the acquisition of any corporate power, and in such cases there cannot be even a *de facto* corporation without compliance. Jones v. Aspen Hardware Co. (1895), 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. R. 220. And in many of the cases, such as those first cited in this note, express prohibitions existed against commencing business as a corporation until certain requirements, like the filing of the articles, were complied with.

68 See, for example, Kaiser v. Lawrence Savings Bank, *supra.* In the judgment of the present writer, the decision in this case is indefensible. There was a valid statute, there was an open, *bona fide,* attempt at compliance, and there was user. The defects pointed out by the court were formal merely and the association should have been held to be at least a *de facto* corporation. See also Bigelow v. Gregory, *supra;* Central Nat. Bank v. Sheldon (1912), 86 Kan. 460, 121 Pac. 340. In Duke v. Taylor (1896), 37 Fla. 64, 19 So. 172, 53 Am. St. R. 232, 31 L. R. A. 484, the failure to organize within the State which granted the charter was held fatal. See also Miller v. Ewer (1847), 27 Me. 509, 46 Am. Dec. 619.

69 See Owensboro Wagon Co. v. Bliss (1901), 132 Ala. 253, 31 So. 81, 90 Am. St. R. 907, Mechem's Cas. 22; Staver & Abbott Mfg. Co. v. Blake (1896), 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798, Mechem's Cas. 28, Burd. Cas. 649; Rutherford v. Hill (1892), 22 Oreg. 218, 29 Pac. 546, 29 Am. St. R. 596, 17 L. R. A. 549, Gilm. Cas. 106.

The one defect which more than all others has been regarded as fatal is that of a failure to comply with the statutory scheme of publicity.[70] The analogy of the officer *de facto*, who must hold by some *color* of right, [71] affords assistance here.

It is, of course, possible that the statute may, in express terms or by necessary intendment, make other acts indispensable to the existence of any kind of corporate character, and in such a case these acts also must be done.

If a corporation *de facto* cannot be established, then, unless some estoppel or other bar can be set up, the members of the defective corporation, engaged in a business which a partnership might conduct, will usually be held liable as partners for the debts of the concern,[72] and their claims between them-

70 See Garnett v. Richardson (1879), 35 Ark. 144; Abbott v. Omaha Smelting Co. (1876), 4 Neb. 416; Richardson v. Pitts (1879), 71 Mo. 128; Guckert v. Hacke (1893), 159 Pa. 303, 28 Atl. 249, Mechem's Partn. Cas. 20; New York Nat. Bank v. Crowell (1896), 177 Pa. 313, 35 Atl. 613; Tonge v. Item Pub. Co. (1914), 244 Pa. 417, 91 Atl. 229; McLennan v. Hopkins (1895), 2 Kan. App. 260, 41 Pac. 1061, Burd. Cas. 41; Harrill v. Davis (1909), 94 C. C. A. 47, 168 Fed. 187, 22 L. R. A. (N. S.) 1153.

Where the statute required the papers to be *filed*, but instead of that they were *recorded* and *returned, held,* no *de facto* corporation. Bergeron v. Hobbs (1897), 96 Wis. 641, 71 N. W. 1056.

Where the papers have been filed with the Secretary of State, but not recorded with the County Recorder as required, the corporation may still be one *de facto;* Newcomb-Endicott Co. v. Fee (1911), 167 Mich. 574, 133 N. W. 540. Same in substance, Doty v. Patterson (1900), 155 Ind. 60, 56 N. E. 668; Bushnell v. Ice Co. (1891), 138 Ill. 67, 27 N. E. 596; Tarbell v. Page (1860), 24 Ill. 46; Vanneman v. Young (1890), 52 N. J. L. 403, 20 Atl. 53. Same, where certified copy instead of a duplicate was filed: Williamson v. Kokomo B. & L. Ass'n (1883), 89 Ind. 389.

The associates, not at fault, will not usually be held responsible for the failure of the recorder to properly file or record. Compare Owensboro Wagon Co. v. Bliss (1901), 132 Ala. 253, 31 So. 81, 90 Am. St. R. 907; Mechem's Partn. Cas. 22; Henkel v. Heyman (1878), 91 Ill. 96, Mechem's Partn. Cas. 709; Manhattan Co. v. Laimbeer (1888), 108 N. Y. 578, 15 N. E. 712, Gilm. Cas. 615.

71 See Mechem on Public Officers, § 319.

72 See, for examples, Kaiser v. Lawrence Savings Bank, *supra;* Guckert v. Hacke, *supra;* Harrill v. Davis, *supra;* Bergeron v. Hobbs, *supra;* Abbott v. Omaha Smelting Co., *supra.*

So, where, though articles were filed, nothing further was done in

selves will, usually at least, be settled on the same basis.[73]

It remains to consider under what circumstances, if any, an estoppel or other bar can be set up.

§ 24. Same subject—The effect of estoppel.—It is said in a great variety of cases that a person who has dealt with a pretended corporation as such will later be *estopped* to deny that it is one in fact.[74] This statement is often made without sufficient foundation in point of facts. Estoppel is a principle of law whereby one person who has made representations of fact to another in order to induce his action will not later be permitted, after the latter has acted upon the representation, to deny it, to the prejudice of the one who has so been induced to change his position. The person to be estopped in these cases is the one who now seeks to hold the associates liable as part-

the way of organization, the incorporators were held personally liable as partners: Central Nat. Bank v. Sheldon (1912), 86 Kan. 460, 121 Pac. 340. Same in substance: McVicker v. Cone (1891), 21 Oreg. 353, 28 Pac. 76.

So, where the debts were incurred before anything had been done toward incorporation: Harrill v. Davis, *supra;* Queen City Furniture Co. v. Crawford (1894), 127 Mo. 356, 30 S. W. 163; Haslett v. Wotherspoon (1845), 2 Rich. Eq. (S. Car.) 395, or before the articles were filed or published: Bigelow v. Gregory (1874), 73 Ill. 197, Gilm. Cas. 104 (but held not liable in such a case where the contract was expressly made on account of the corporation and was adopted by it as soon as the organization was completed, Whitney v. Wyman (1879), 101 U. S. 392, 25 L. Ed. 1050).

So where the associates did not purport to organize under *any* statute: Pettis v. Atkins (1871), 60 Ill. 454; Forbes v. Whittemore (1896), 62 Ark. 229, 35 S. W. 223.

73 See, *e. g.* Flagg v. Stowe (1877), 85 Ill. 164; Rainwater v. Childress (1915), 121 Ark. 541, 182 S. W. 280.

Compare Doty v. Patterson (1900), 155 Ind. 60, 56 N. E. 668.

74 See, for example, Greenville v. Greenville Co. (1899), 125 Ala. 625, 27 So. 764; Plummer v. Struby Co. (1896), 23 Colo. 190, 47 Pac. 294; Booske v. Ice Co. (1888), 24 Fla. 550, 5 So. 247; Petty v. Brunswick Ry. Co. (1899), 109 Ga. 666, 35 S. E. 82; Winget v. Quincy Bldg. Ass'n (1889), 128 Ill. 67, 21 N. E. 12; Stoutimore v. Clark (1879), 70 Mo. 471; Nashua Co. v. Moore (1874), 55 N. H. 48; Commercial Bank v. Pfeiffer (1888), 108 N. Y. 242, 15 N. E. 311; Building & L. Ass'n v. Chamberlain (1893), 4 S. Dak. 271, 56 N. W. 897. But compare Loverin v. McLaughlin (1896), 161 Ill. 417, 44 N. E. 99.

ners. What representation of fact has he made to them? Does he represent to them that they are a corporation,[75] or are they ordinarily the ones who make the representation to him? It may be said that his representation to them is merely that he is dealing with them on a corporate basis, and that he may be estopped to deny that fact. This is doubtless what is ordinarily meant. Even so, it is essential that he shall have known that they pretended to be a corporation and were purporting to deal with him on that basis only.[76] Where the representation, moreover, is not one of fact but of law—like the validity of the statute—estoppel will not ordinarily arise.[77]

§ 25. —— The difficulty with the free application of the doctrine of estoppel is that, by means of it, the state may be filled with alleged corporate bodies which no statute has authorized, but which, so far as the persons dealing with them are concerned, the courts must deal with as though they had a valid existence. Of course, this estoppel would not operate against the state if it saw fit to question their right to do business; but state officials are notoriously slow to act in such cases unless somebody strenuously insists upon it.

If there is to be any estoppel as to the fact of corporate existence in these cases, it ought, as a matter of policy, to be confined to those in which there might be at least a corporation *de facto*, *i. e.*, to those in which there is a valid statute or at least a statute not yet declared unconstitutional. If the estoppel be merely as to the basis of liability, a statute would not be indispensable if the dealings otherwise showed what was to be the nature and extent of the liability.

§ 26. Same subject—The doctrine of contractual limitation. —It is sometimes said that, instead of estoppel, there is an implied contract between the parties that their dealings are upon the basis of a liability limited to the associate funds and exclud-

[75] See Cottentin v. Meyer (1910), 80 N. J. L. 52, 76 Atl. 341.

[76] See, for example, Eaton v. Walker, and Guckert v. Hacke, cited in §§ 22, 23 *supra*.

[77] See Ewart on Estoppel, 72 *et seq.*

ing any personal liability. That contracts of this sort may be expressly made is not to be denied; and an implied contract may undoubtedly also exist.[78] The difficulty here, in many cases, is to find the foundation of facts from which such a contract may be implied. Neither an express nor an implied contract could be upheld, if to do so would violate the policy of the state.

§ 27. Same subject—The doctrine that no one but the State may raise the question.—Finally, it is frequently asserted that the question of the legal existence of a body purporting to be a corporation and doing business as such, is one which may be raised by the state alone, and will not be tried collaterally in suits between private parties. Where the body in question amounts to a *de facto* corporation, the authorities which declare this rule are very numerous.[79] It is, in such cases, merely a reflex of the *de facto* doctrine. It will be found most frequently coupled with the question of estoppel, though, as has been seen, the *de facto* corporation does not depend upon estoppel. It will be found applied in some cases in which there was a statute and user but no colorable or ostensible attempt to comply with the statute by filing or recording the required articles. Such a rule, however, could have little or no application to a case in which, for the lack of a statute, there could not be a *de facto* corporation, *i. e.*, to a case of the naked assumption of corporate privileges.

§ 28. Same subject—Rights as partners in such cases.—Although the question usually presents itself as a matter of the

78 See Staver & Abbott Mfg. Co. v. Blake (1896), 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798; Mechem's Cas. 28, Burd. Cas. 649; Frost v. Thompson (1913), 219 Mass. 360, 106 N. E. 1009.

79 See Imperial Building Co. v. Board of Trade (1909), 238 Ill. 100, 87 N. E. 167; Marshall v. Keach (1907), 227 Ill. 35, 81 N. E. 29, 118 Am. St. R. 247, 10 Ann. Cas. 164; Sniders' Sons Co. v. Troy (1890), 91 Ala. 224, 8 So. 658, 11 L. R. A. 515, 24 Am. St. R. 887; Vanneman v. Young (1890), 52 N. J. L. 403, 20 Atl. 53; Higbie v. Aetna B. & L. Ass'n (1910), 26 Okla. 327, 109 Pac. 236, Ann. Cas. 1912 B, 223; Brown v. Webb (1912), 60 Oreg. 526, 120 Pac. 387, Ann. Cas. 1914 A, 148; Calor Oil Co. v. Franzell (1908), 128 Ky. 715, 109 S. W. 328, 36 L. R. A. (N. S.) 456, 33 Ky. Law Rep. 98.

liability of the associates as partners, the correlative question of their rights as such in similar cases may also arise. In a case, often cited, in which the associates sued as a corporation for the recovery of certain property, and were met with the defence that their organization as a corporation was too defective to permit the action to be maintained, the court, while acceding to this view, nevertheless held that the action could be sustained as one by a partnership doing business under the same name. As a partnership with the same name it could have taken title to the property in question; the associates would have been liable as partners; and the court held that they were entitled to the advantages which would be accorded to a similar partnership.[80]

§ 29. **Promoters of companies.**—Promoters of corporations are not, as such, partners. Though engaged in endeavoring to secure the organization of a company to carry on business for pecuniary profit, their immediate object is not the transaction of business for mutual gain, and they do not fall within the definition or the purposes of partnership.[81]

Nevertheless, if they carry on a business as incident to the organization, or if they launch and conduct the business before the corporation is organized, or if they conduct the business without ever bringing even a *de facto* corporation into existence, they will usually be liable as partners.[82]

[80] See Jones v. Aspen Hardware Co. (1895), 21 Colo. 263, 40 Pac. 457, 52 Am. St. R. 220, 29 L. R. A. 143. See also Smith v. Texas, etc. R. Co. (1908), 101 Tex. 405, 108 S. W. 819; New Haven Wire Co. Cases (1889), 57 Conn. 352, 394; 18 Atl. 266, 5 L. R. A. 300. *Cf.* African M. E. Church v. New Orleans (1860), 15 La. Ann. 441; Maugham v. Sharpe (1864), 17 C. B. (N. S.) 443; National Shutter Bar Co. v. Zimmerman (1909), 110 Md. 313, 73 Atl. 19; Byam v. Bickford (1885), 140 Mass. 31, 2 N. E. 687.

[81] See Reynell v. Lewis (1846), 15 Mees. & Welsby, 517; Capper's Case (1851), 1 Sim. (N. S.) 178; Batard v. Hawes (1852), 2 Ellis & B. 287, Burd. Cas. 33; Ringolsky v. Mining Co. (1914), 262 Mo. 241, 171 S. W. 56; Long v. Citizens Bank (1892), 8 Utah 104, 29 Pac. 878; United States Wood Preserv. Co. v. Lawrence (1915), 89 Conn. 633, 95 Atl. 8.

[82] See Loverin v. McLaughlin (1896), 161 Ill. 417, 44 N. E. 99; Nicholls v. Buell (1909), 157 Mich. 609, 122 N. W. 217; Ridenour v. Mayo (1883), 40 Ohio St. 9; Bar-

§ 30. Contemplated partnerships.—A mere intention to form a partnership does not constitute one. Persons, therefore, who are merely contemplating a future partnership, or who have simply entered into an agreement to thereafter become partners, cannot be held liable as partners, nor have they the rights of partners as between themselves.[83] Before this result can ensue the executory agreement must have been executed. As declared in one case,[84] "A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. It is undoubtedly true that a partnership *in præsenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled

nett v. Lambert (1846), 15 Mees. & Wels. 489; Wechselberg v. Nat. Bank (1894), 12 C. C. A. 56, 64 Fed. 90, 26 L. R. A. 470.

[83] See Atkins v. Hunt (1843), 14 N. H. 205, Mechem's Cas. 79 (citing Bourne v. Freeth, 9 Barn. & Cr. 632; Dickinson v. Valpy, 10 id. 128; Fox v. Clifton, 6 Bing. 776; Howell v. Brodie, 6 Bing. N. C. 44); Dow v. State Bank (1903), 88 Minn. 355, 93 N. W. 121, Gilm. Cas. 87; Martin v. Baird (1896), 175 Pa. 540, 34 Atl. 809, Mechem's Cas. 744, Burd. Cas. 34; National Bank v. Cringan (1895), 91 Va. 347, 21 S. E. 820; Shield v. Adkins (1915), 117 Va. 616, 85 S. E. 492; Sabel v. Savannah Rail & Equip. Co. (1903), 135 Ala. 380, 33 So. 663, Gilm. Cas. 116.

If, in such a case, one of the proposed partners dies before the partnership is launched, it will not come into effect, and provisions in the articles as to the effect of the death of one partner will not apply to this case. Dow v. State Bank, *supra*.

[84] Reed v. Meagher (1890), 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455. See, also, Buzard v. McAnulty (1890), 77 Tex. 438, 14 S. W. 138; Sabel v. Savannah Rail & Equip. Co., *supra*.

that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is no remedy between the parties except a suit in equity for specific performance, or an action at law for the recovery of damages, should any be sustained."

So long as essential terms remain undetermined, there can rarely be a present partnership.[85]

§ 31. Same subject.—The mere time of executing the articles is not conclusive, for persons may become partners at once, if such is the intention, even though partnership articles are thereafter to be executed. The test is the intention. If it is the intention that the parties are not to become partners until the terms have been agreed upon and articles executed, the partnership will not come into existence until that time, unless the condition is waived; but if the terms have been agreed upon, the execution of the articles, or the performance of other conditions, may be postponed or waived, and such a waiver will often be presumed where the parties actually begin business as partners before the conditions have been performed.[86]

Such a waiver is much more likely to be inferred where the rights of creditors, who have reasonably relied upon appearances of an actual partnership, are concerned, than in controversies between the parties themselves.[87] In the latter case, it may often be shown that what was done was provisional, tentative or conditional only and not final.[88]

§ 32. Classification of partnerships.—Partnerships are sometimes classified as ordinary partnerships, limited partnerships,

[85] See Sabel v. Savannah Rail & Equip. Co., *supra;* Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. Ed. 1169, 14 S. Ct. 201, Mechem's Cas. 260, Burd. Cas. 503, Gilm. Cas. 425.

[86] Cook v. Carpenter (1861), 34 Vt. 121, 80 Am. Dec. 670; Hartman v. Woehr (1867), 18 N. J. Eq. 383; Atkins v. Hunt (1843), 14 N. H. 205, Mechem's Cas. 79; Kerrick v. Stevens (1884), 55 Mich. 167, 20 N. W. 888, Mechem's Cas. 87; First Nat. Bank v. Cody (1893), 93 Ga. 127, 19 S. E. 831; Bopp v. Fox (1872), 63 Ill. 540.

[87] See Cain Lumber Co. v. Standard Dry Kiln Co. (1895), 108 Ala. 346, 18 So. 882.

[88] One of the most striking cases of this sort is Martin v. Baird (1896), 175 Pa. 540, 34 Atl. 809, Mechem's Cas. 744, Burd. Cas. 34.

and joint-stock companies. The peculiarities of the latter are separately considered. Ordinary partnerships may be divided, according to their scope, into (1) *universal,* (2) *general,* and (3) *special* or *particular* partnerships,—a classification corresponding to that of agency, and based upon substantially the same distinctions. An universal partnership is one in which all the property and services of the parties are united, and all profits, however made, are for their joint benefit. A general partnership is one created for the general and continuing conduct of some kind of business, or of a number of kinds of business. A special or particular partnership is one created for a single transaction or adventure.

It has been thought that an universal partnership could exist only in theory, but several cases have occurred in this country of partnerships which were practically universal. In any event, however, the evidence must be clear to establish such an unusual relation.[89]

§ 33. —— Ordinary partnerships may also be divided, according to the nature of their business, into *trading* and *non-trading* partnerships. This distinction, which is made quite important in many states, is not a very definite or satisfactory one. The common basis of distinction is whether the partnership is organized to buy and sell as a business. If it is, it is a trading partnership; otherwise a non-trading partnership. The chief consequence of the distinction is found in the implied authority of the partners. The subject will be more fully considered in a later section.[90]

§ 34. Same subject—Peculiar forms of partnership.—In addition to the ordinary and typical form of partnership, there are several others, more or less anomalous, which have been already mentioned but whose peculiarities must be more fully pointed out. Thus, there are—

[89] See United States Bank v. Binney (1828), 5 Mason (U. S. C. C.), 183; Lyman v. Lyman (1829), 2 Paine (U. S. C. C.), 11; Rice v. Barnard (1848), 20 Vt. 479, 50 Am. Dec. 54; Goesele v. Bimeler (1852), 14 How. (U. S.) 589; Gray v. Palmer (1858), 9 Cal. 616; Hamilton v. Halpin (1890), 68 Miss. 99, 8 So. 739; Gasely v. Society (1862), 13 Ohio St. 144.

[90] See *post,* § 241.

§ 35. ——1. Joint stock companies.—Joint stock companies, so called, as has already been seen, are usually ordinary partnerships except that, by the original contract of the members, the *delectus personarum* is more or less completely waived, and it is agreed that any member may transfer his share, with or without conditions as may be stipulated in the articles, and that his transferee shall accordingly be received into the partnership. The number of members is likely to be greater in these than in ordinary partnerships, they frequently adopt an impersonal or association name or title, and the conduct of affairs is more likely to be delegated by all the partners to some of them or to designated agents. Aside from these peculiarities, the ordinary rules of partnership usually apply.[91] The liability of an outgoing partner to creditors for existing debts is not usually affected by the agreements for transferring shares; they operate between the parties only, unless the creditors have assented to them.[92] The liability of an incoming partner to existing creditors in these partnerships is usually the same as in ordinary partnerships.[93] They may exist without statutory authority,[94] though in a number of states they have been regulated or provided for by statute, and the right to sue in the firm name or in the name of one of the officers is often conferred.[95] Many concerns in some states, and several of the great express companies, have been organized as joint stock companies.[96]

91 See Tappan v. Bailey (1842), 4 Metc. (Mass.) 529; Tyrrell v. Washburn (1863), 6 Allen (Mass.) 466; Phillips v. Blatchford (1884), 137 Mass. 510; Farnum v. Patch (1880), 60 N. H. 294, 49 Am. Rep. 313; Hodgson v. Baldwin (1872), 65 Ill. 532; Beaman v. Whitney (1841), 20 Me. 413; Manning v. Gasharie (1866), 27 Ind. 399; Carter v. McClure (1897), 98 Tenn. 109, 38 S. W. 585, 60 Am. St. R. 842, 36 L. R. A. 282, Burd. Cas. 37, Gilm. Cas. 108; Moore v. May (1903), 117 Wis. 192, 94 N. W. 45; Spotswood v. Morris (1906), 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; People v. Coleman (1892), 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Great Southern Hotel Co. v. Jones (1899), 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 482.

92 See Tyrrell v. Washburn, *supra*.

93 See Powell Co. v. Finn (1902), 198 Ill. 567, 64 N. E. 1036.

94 See Phillips v. Blatchford, *supra*.

95 See references to the statute in New York, in People v. Coleman, *supra*.

96 See United States v. Adams Express Co. (1912), 229 U. S. 381,

§ 36. —— 2. **Partnership associations.**—In a few states, statutes have provided for what are called *partnership associations*, or *partnership associations, limited.* They have limited liability, transferable shares, and sue and deal in the associate name. They are more like corporations than partnerships, and some of the courts have held them to be corporations.[97] Not all the courts, however, have concurred in this view,[98] and the supreme court of the United States has denied their right to sue as corporations in the federal courts.[99]

§ 37. —— 3. **Mining partnerships.**—In some of the mining states, though not in all, a peculiar form of partnership has been developed in mining enterprises. They are non-statutory, and presumptively arise, without express agreement to that effect, where tenants in common of a mining property proceed to develop and operate it without any other agreement. Shares are presumptively transferable, there is no *delectus personarum*, and the implied authority of each partner is limited as in non-trading partnerships.[1] The recognition of these peculiar mining

57 L. ed. 1237, 33 S. Ct. 878; Hibbs v. Brown (1907), 190 N. Y. 167, 82 N. E. 1108.

97 See Rouse, Hazard & Co. v. Detroit Cycle Co. (1896), 111 Mich. 251, 69 N. W. 511, 38 L. R. A. 794; Staver & Abbott Mfg. Co. v. Blake (1896), 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798, Mechem's Cas. 28, Burd. Cas. 649.

98 See Edwards v. Warren Linoline Works (1897), 168 Mass. 564, 47 N. E. 502, 38 L. R. A. 791; Carter v. Producers' Oil Co. (1897), 182 Pa. 551, 38 Atl. 571, 39 L. R. A. 100.

99 See Great Southern Hotel Co. v. Jones, *supra.*

1 Mining partnerships have been recognized in California, Colorado, Idaho, Kansas, Montana, Virginia, West Virginia, Wyoming, but not in Pennsylvania. See Skillman v. Lachman (1863), 23 Cal. 198, 83 Am. Dec. 96 and note: Kahn v. Smelting Co. (1880), 102 U. S. 641, 26 L. ed. 266; Read v. Meagher (1890), 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Haskins v. Curran (1895), 4 Idaho 573, 43 Pac. 559; Patrick v. Weston (1895), 22 Colo. 45, 43 Pac. 446; Huston v. Cox (1918), 103 Kan. 73, 172 Pac. 992; Congdon v. Olds (1896), 18 Mont. 487, 46 Pac. 261; Childers v. Neely (1899), 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. R. 777, Mechem's Cas. 34; Lamar v. Hale (1884), 79 Va. 147; Hartney v. Gosling (1902), 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. R. 1005. See also Judge v. Braswell (1877), 76 (13 Bush) Ky. 67, 26 Am. R. 185; Hotchkiss v. Quarry Co. (1889), 58 Conn. 120, 19 Atl. 521.

partnerships, of course, does not preclude the organization of an ordinary partnership to carry on mining operations if the parties so agree.[2]

§ 38. —— 4. **Limited partnerships.**—These are purely statutory creations, having some partners whose powers and liabilities are general as in ordinary partnerships, and some partners who take no part in the management and whose liability is limited to the amount they agree to contribute to the capital. Limited partnerships are separately considered in a later chapter.[3]

§ 39. —— 5. **Sub-partnerships.**—What is sometimes called a sub-partnership may arise where one partner in an ordinary firm unites by separate agreement to share his interest in the firm with a third person who is not a partner in the firm. This arrangement, also, is separately considered in a later section.[4]

§ 40. **Trust or partnership.**—The question whether the beneficiaries of the modern "business trust" can be deemed to be partners has arisen in a number of cases. In one of the most recent,[5] it is said: "A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they are to act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership."

The differences between the partnership and the trust are

[2] See Decker v. Howell (1872), 42 Cal. 636.

[3] See *post*, Ch. XXII.

[4] See *post*, § 58.

[5] See Frost v. Thompson (1913), 219 Mass. 360, 106 N. E. 1009; Sleeper v. Park (1919), 232 Mass. 292, 122 N. E. 315; Horgan v. Morgan (1919), 233 Mass. 381, 124 N. E. 32. Compare Rice v. Rockefeller (1892), 134 N. Y. 174, 31 N. E. 907, 30 Am. St. R. 658, 17 L. R. A. 237.

The personal liability referred to in this section is that at law rather than in equity.

numerous. The most important, perhaps, is the one of the personal liability of the members for the contracts and acts of those who conduct the business. They would not usually be so liable to the creditor if it were a trust, while they would usually be so liable if it were a partnership. There are also differences in the manner of conducting the business; in the revocability of the arrangements creating the relation; and in other matters.

§ 41. Classification of partners.—In limited partnerships the partners are either (1) *general,* or (2) *special,* the former standing in the attitude of an ordinary partner, and the latter occupying a peculiar position, prescribed by statute, with a liability limited to his contribution.[6]

In ordinary partnerships, partners may be classified as (1) *active and ostensible;* (2) *secret* or *dormant,* and (3) *nominal.*

An *ostensible* partner, sometimes called a public partner, is one who is held out and known as a partner. An *active* partner is one who actually participates in the conduct of the business. He is usually an ostensible one, but is not necessarily so. A partner may be unknown or concealed and yet active in the management of the business; or he may be both concealed and passive as to the conduct of the business. In the former case he is said to be a *secret* partner, and in the latter case he is called a *silent* or *dormant* partner. A *nominal* partner is a person apparently a partner but not really so. A person who leaves an existing firm is often called a *retiring* partner, while one who enters such a firm is called an *incoming* partner.

All actual partners are liable for the debts of the firm incurred while they were members of it, whether they were disclosed as partners or not; but a really dormant partner who retires from the firm is not required, like other partners, to give notice of that fact, in order to escape liability for subsequent indebtedness.[7]

6 See *post,* Chapter XXII.

7 See *post,* § 397.

CHAPTER II.

FOR WHAT PURPOSES A PARTNERSHIP MAY BE CREATED.

§ 42. **For any lawful business.**—It is the general rule, analogous to that of agency, that a partnership may be created for the purpose of carrying on any lawful business, and that whatever business the individual partners might lawfully carry on if acting separately and in their own behalf, they may lawfully conduct in partnership. Thus, there may be a partnership for carrying on not only every lawful kind of trade or commerce, but also for farming, mining, lumbering, manufacturing, transportation, and the like. Professional occupations like that of the lawyer, physician, dentist and architect may also be carried on in partnership, and there may be a partnership for buying and selling land.[1]

[1] Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550, Mechem's Cas. 38, Gilm. Cas. 136; Flower v. Barnekoff (1890), 20 Oreg. 137, 25 Pac. 370, 11 L. R. A. 149; Bates v. Babcock (1892), 95 Cal. 479, 30 Pac. 605, 29 Am. St. R. 133, 16 L. R. A. 745.

To buy and sell oil leases, options, etc.: Ewers v. Montgomery (1910), 68 W. Va. 453, 69 S. E. 907; Bird v. Wilcox (1919), 104 Kan. 799, 180 Pac. 774.

So, of coal options: McKinley v. Lynch (1905), 58 W. Va. 44, 51 S. E. 4.

To carry on farming operations: Wilson v. Todhunter (1918) — Ark. —, 207 S. W. 221.

"The business of breeding, training, and racing horses for purses is legal", and a partnership may lawfully be created for that purpose. Central Trust Co. v. Respass (1902), 112 Ky. 606, 66 S. W. 421, 23 Ky. L. R. 1905, 99 Am. St. R. 317, 56 L. R. A. 479, Mechem's Cas. 728, Gilm. Cas. 139; but not for betting on horse races or "book making."—*Id.*

§ 43. Same subject—Series of acts—Continuous business—Single adventure.—Partnerships are undoubtedly usually organized for the purpose of carrying on a more or less permanent and continuing trade or business; but it is well settled that there may be a partnership for a single piece of business or for a particular venture.[2] The early forms of partnership were frequently such. It must, however, be undertaken as a business, to distinguish it from the case, for example, referred to in a previous section,[3] wherein two persons, not otherwise partners and not intending to embark upon the business of buying and selling land, unite to buy a particular parcel of land to hold for an advance in price. Thus, for example, an association to purchase a tract of land to be held and disposed of as a unit in one transaction might not constitute a partnership, while an

[2] See Kayser v. Maugham (1885), 8 Colo. 232, 6 Pac. 803 (contract to unite to sell a particular mine at a profit, called a partnership); Shackelford v. Williams (1913), 182 Ala. 87, 62 So. 54 (same in substance); Yeoman v. Lasley (1883), 40 Ohio St. 190 (contract to buy a particular farm supposed to contain coal, to be resold at a profit, called a partnership); Hulett v. Fairbanks (1883), 40 Ohio St. 233 (same in substance); Jones v. Davies (1899), 60 Kan. 309, 56 Pac. 484, 72 Am. St. R. 354 (same in substance); Spencer v. Jones (1899), 92 Tex. 516, 50 S. W. 118, 71 Am. St. R. 870 (same as last); Canada v. Barksdale (1881), 76 Va. 899 (same as last); Mitchell v. Tonkin (1905), 109 N. Y. App. Div. 165, 95 N. Y. S. 669 (called a partnership); Williamson v. Nigh (1906), 58 W. Va. 629, 53 S. E. 124; Bates v. Babcock, *supra;* Flower v. Barnekoff, *supra.*

But see Jones v. Gould (1913), 209 N. Y. 419, 103 N. E. 720 (similar contract, said not to be partnership but joint venture); Clark v. Sidway (1891), 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157 (said to be tenancy in common, not partnership); Gottschalk v. Smith (1895), 156 Ill. 377, 40 N. E. 937 (not a partnership); Hurley v. Walton (1872), 63 Ill. 260 (single fishing venture, not a partnership); Williams v. Gillies (1878), 75 N. Y. 197 (purchase of land on speculation not a commercial partnership). Cases of limited interests in particular transactions held not partnerships: Butler v. Union Trust Co. (1918), 178 Cal. 195, 192 Pac. 601; Jackson v. Hooper (1909), 76 N. J. Eq. 185, 74 Atl. 130; Causten v. Barnette (1908), 49 Wash. 659, 96 Pac. 225; Stundon v. Dahlenberg (1914), 184 Mo. App. 381, 171 S. W. 37; Sutton v. Missouri, etc., Ry. Co. (1919), 104 Kan. 282, 178 Pac. 418.

Co-tenants rather than partners: Magee v. Magee (1919), — Mass. —, 123 N. E. 673.

[3] See *ante,* § 14.

association to buy such a tract, subdivide it into many lots, employ surveyors, engineers and brokers, and enter upon the more or less protracted business of selling out the various lots at retail, might easily be held to be a partnership.[4]

§ 44. Not for purposes unlawful or opposed to public policy.—But, as in the case of agency, there are many purposes for which the relation cannot lawfully be created. Thus, a trust personal to one individual cannot be executed by a partnership; public offices cannot be held in partnership; and a partnership cannot lawfully be created for the doing of anything which is in itself, or which directly and immediately tends to promote acts which are, illegal, immoral or opposed to public policy. Partnerships, therefore, for the purpose of gambling or of carrying on a gambling establishment; to speculate in "futures"; to "corner" the market, or to stifle or prevent competition; to carry on a forbidden occupation; to hinder or delay creditors; to carry on trade with belligerents in time of war; to carry on trade in violation of the navigation laws; to secure contracts from government or public officials by improper means; to corrupt public or private agents; to carry on business without a license where that is necessary; and the like, are illegal.[5]

[4] So held in Winstanley v. Gleyre (1893), 146 Ill. 27, 34 N. E. 628.

[5] See Woodworth v. Bennett (1870), 43 N. Y. 273, 3 Am. Rep. 706, Mechem's Cas. 43; Craft v. McConoughy (1875), 79 Ill. 346, 22 Am. Rep. 171, Mechem's Cas. 48; Central Trust Co. v. Respass (1902), 112 Ky. 606, 66 S. W. 421, 23 Ky. L. R. 1905, 99 Am. St. R. 317, 56 L. R. A. 479, Mechem's Cas. 728, Gilm. Cas. 139; Smith v. Richmond (1902), 114 Ky. 303, 70 S. W. 846, 102 Am. St. R. 283, 24 Ky. L. R. 1117; McMullen v. Hoffman (1898), 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117; Gaston v. Drake (1879), 14 Nev. 175, 33 Am. Rep. 548; Davis v. Gelhaus (1886), 44 Ohio St. 69, 4 N. E. 593; Hunter v. Pfeiffer (1886), 108 Ind. 197, 9 N. E. 124; Watson v. Fletcher (1850), 7 Gratt. (Va.) 1; Watson v. Murray (1872), 23 N. J. Eq. 257; King v. Winants (1874), 71 N. C. 469, 17 Am. Rep. 11; Citizen's Bank v. Mitchell (1909), 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; Kennedy v. Lonabaugh (1911), 19 Wyo. 352, 117 Pac. 1079; Jackson v. Akron Brick Ass'n (1895), 53 Ohio St. 303, 41 N. E. 257, 53 Am. St. R. 638, 35 L. R. A. 287; Patty-Joiner Co. v. City Bank (1897), 15 Tex. Civ. App. 475, 41

§ 45. Purposes illegal in part.—A partnership may be organized for two or more purposes, part of which are lawful and part of which are unlawful, or it may be created for a lawful purpose, and yet one or more of its undertakings may be illegal, or it may seek to accomplish lawful ends by unlawful means. In such cases the lawful part, if it can be separated from the residue, will not be affected by the illegality; if it cannot be separated, the whole must be regarded as unlawful.[6]

If the partnership be legal, but a certain transaction is illegal, and the latter can be segregated, it alone will be affected; and the rights of partners who were not implicated will not be destroyed.[7]

§ 46. Effect of illegality.—Courts will not enforce contracts having for their purpose, or tending directly to promote, illegal objects. The members of an illegal partnership cannot sue to enforce any contract tainted by the illegality, but actions may be brought against the members of such a partnership by a person who did not participate in the illegality. As between themselves, the law usually leaves the members of an illegal partnership where it finds them, refusing to aid either party. Courts will not, therefore, enforce contribution or compel an accounting of their illegal affairs;[8] though if the unlawful transaction is completely ended and there remains in the hands of

S. W. 173, Burd. Cas. 484; Wright v. Cudahy (1897), 168 Ill. 86, 48 N. E. 39; Willson v. Morse (1902), 117 Iowa 581, 91 N. W. 823.

6 See Dunham v. Presby (1876), 120 Mass. 285; Anderson v. Powell (1876), 44 Iowa, 20; Foyer v. Harken (1909), 142 Iowa 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477; Wishek v. Hammond (1900), 10 N. Dak. 72, 84 N. W. 587.

7 In Estate of Ryan (1914), 157 Wis. 576, 147 N. W. 993, the court says that, as between the partners, "a claim for contribution will not be rejected unless the partnership is an illegal partnership, or unless the act relied on as the basis of the claim was not only illegal, but the illegality was such that it must or ought to have been known, to the partner seeking contribution, to have been illegal when it was committed." See § 188, *post;* Thwaites v. Coulthwaite [1896], 1 Ch. 496; Keen v. Price [1914], 2 Ch. 98.

8 See Central Trust Co. v. Respass (1902), 112 Ky. 606, 66 S. W. 421, 23 Ky. L. R. 1905, 99 Am. St. R. 317, 56 L. R. A. 479, Mechem's Cas. 728; McMullen v. Hoffman (1898), 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117; Hunter v. Pfeiffer (1886), 108 Ind. 197, 9 N. E. 124; Gould v. Kendall (1884), 15 Neb. 549, 19 N.

one of them property or money which, but for the past illegality, would belong to both of them, or if they have themselves wound up the affairs and agreed upon the account, it is held in some cases that the courts will then compel the partner having the property or funds in his possession to pay over to his partner the latter's share, even though such property or funds were acquired in unlawful dealings.[9] The weight of authority, however, denies relief in these cases as well as in the others.[10] The true test seems to be whether to maintain the action requires the court to enforce or carry out the illegal contract. If it will so require, the court will decline to interfere,—not because of any consideration for the defendant, but because the court will not lend its aid or be a party to the illegal transaction.[11]

The taint of illegality, however, does not follow property or money forever, and where even ill-gotten gains have been invested in a new and lawful enterprise the proceeds of it may be recovered.[12]

The illegality of the transaction need not be pleaded: courts will take notice of it wherever it appears.

W. 483; Woodworth v. Bennett (1870), 43 N. Y. 273, 3 Am. Rep. 706, Mechem's Partn. Cas. 43; Read v. Smith (1883), 60 Tex. 379; Wiggins v. Bisso (1898), 92 Tex. 219, 47 S. W. 637, 71 Am. St. R. 837; Emery v. Candle Co. (1890), 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. R. 819; Morrison v. Bennett (1898), 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Craft v. McConoughy (1875), 79 Ill. 346, 22 Am. Rep. 171, Mechem's Cas. 48; Wright v. Cudahy (1897), 168 Ill. 86, 48 N. E. 39; and other cases cited in the notes to § 44, *ante*.

9 See Brooks v. Martin (1864), 2 Wall. (U. S.) 70, 17 L. ed. 732; Crescent Ins. Co. v. Bear (1887), 23 Fla. 50, 1 So. 318, 11 Am. St. R. 331; De Leon v. Trevino (1878), 49 Tex. 88, 30 Am. Rep. 101; Patty-Joiner Co. v. City Bank (1897), 15 Tex. Civ. App. 475, 41 S. W. 173, Burd. Cas. 484; Andrews v. Brewing Association (1896), 74 Miss. 362, 20 So. 837, 60 Am. St. R. 509.

10 See Central Trust Co. v. Respass, *supra;* McMullen v. Hoffman, *supra;* Sykes v. Beadon (1879), 11 Ch. Div. 170; Snell v. Dwight (1876), 120 Mass. 9; Jackson v. McLean (1889), 100 Mo. 130, 13 S. W. 393; Woodworth v. Bennett, *supra;* Hunter v. Pfeiffer, *supra;* Craft v. McConoughy, *supra.*

11 See McMullen v. Hoffman, *supra;* Central Trust Co. v. Respass, *supra;* Woodworth v. Bennett, *supra.*

12 See Armstrong v. American Exch. Nat. Bank (1890), 133 U. S. 433, 10 Sup. Ct. 450, 33 L. ed. 747; King v. Winants, *supra;* Mitchell v. Fish (1911), 97 Ark. 444, 134 S. W. 940, 36 L. R. A. (N. S.) 838.

CHAPTER III.

WHO MAY BE PARTNERS.

§ 47. In general, any person competent to contract.—As a general rule, any person may be a partner who is capable of entering into contractual relations. If he has the legal ability in his own right and in his individual capacity to transact the business contemplated, he may usually unite with another person to carry on that business in partnership.

This being the general rule, it is unnecessary to pursue it further in respect of normal persons, but in regard to those who labor under some general disability, more particular mention is desirable. Thus—

§ 48. Aliens as partners.—Aliens who are subjects of nations which are at peace with each other may enter into partnership, but not alien enemies. Upon the breaking out of war between their respective countries, however, their capacity to act as partners is ordinarily terminated, and their partnership, as will be seen, is usually suspended if not dissolved.[1]

§ 49. Infants as partners.—An infant may be a partner.[2] His contract of partnership and his contracts as a partner are

[1] See *post,* § 369.

[2] Bush v. Linthicum (1882), 59 Md. 344, Mechem's Cas. 55, Burd. Cas. 154; Adams v. Beall (1887), 67 Md. 53, 8 Atl. 664, 1 Am. St. R. 379, Mechem's Cas. 51; Dunton v. Brown (1875), 31 Mich. 182; Osburn v. Farr (1879), 42 Mich. 134, 3 N. W.

not void, but they are voidable at his option, and he may interpose his infancy as a defense against personal liability as a partner. During the continuance of the relation, however, he has all of the rights and powers of a partner. Thus, he has equal right, with his copartner, to the possession of the assets of the firm; he may collect and pay debts; and may make contracts in the firm name, which, though he may repudiate liability, will be binding upon his adult copartners and upon the partnership assets.[3] He is entitled to an accounting and to his share of the profits like other partners.

He may disaffirm his contract of partnership and avoid personal liability as a partner either to his copartner[4] or third persons;[5] but, notwithstanding such disaffirmance, it is held that his interest in the partnership property remains liable to

299. He may be the general partner in a limited partnership: Continental National Bank v. Strauss (1893), 137 N. Y. 148, 553, 32 N. E. R. 1066; or the ostensible partner in a nominal partnership: Codville Co. v. Smart (1907), 15 Ont. L. Rep. 357.

Latrobe v. Dietrich (1910), 114 Md. 8, 78 Atl. 983; Conary v. Sawyer (1899), 92 Me. 463, 43 Atl. 27, 69 Am. St. R. 525; Moley v. Brine (1876), 120 Mass. 324; Page v. Morse (1878), 128 Mass. 99; Pelletier v. Couture (1899), 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Yates v. Lyon (1875), 61 N. Y. 344.

That a partnership actually existed between a mother and her young children who carried on a business after the death of the father, was denied in Tuite v. Tuite (1907), 72 N. J. Eq. 740, 66 Atl. 1090.

3 See Bush v. Linthicum, *supra*, and other cases cited in this section.

4 Thus his infancy is a good defense to his copartner's action for contribution. Neal v. Berry (1893), 86 Me. 193, 29 Atl. 987. Whether the infant may disaffirm a partnership obligation to a third person without also repudiating the partnership relation itself seems to be disputed. It is held that he may do so, in Mehlhop v. Rae (1894), 90 Iowa 30, 57 N. W. 650. Miller v. Sims (1834), 2 Hill (S. C.), 479, is *contra*.

5 Bush v. Linthicum, *supra*; Folds v. Allardt (1886), 35 Minn. 488, 26 N. W. 201; Mehlhop v. Rae (1894), 90 Iowa, 30, 57 N. W. 650; Foot v. Goldman (1891), 68 Miss. 529, 10 So. 62; Bixler v. Kresge (1895), 169 Pa. 405, 32 Atl. 414, 47 Am. St. R. 920, Burd. Cas. 115. Although there seems to be some difference of opinion, the weight of authority is to the effect that the infant may disaffirm personal contracts and contracts respecting personal property before as well as after he arrives at maturity. See Adams v. Beall; Folds v. Allardt; Dunton v. Brown, *supra*, and Shirk v. Shultz, *post*.

the partnership debts, thus creating a sort of non-statutory limited partnership, with the infant as the limited partner.[6] So if he has paid money for the privilege of being admitted into the business, he cannot, it is held, after continuing in the business for a period, voluntarily withdraw and recover back what he has paid, unless it was procured from him by fraud.[7] Bankruptcy proceedings may be maintained against the firm and its assets, though no decree can be made against the infant partner personally.[8] The adult partner cannot repudiate firm contracts made by the infant on the ground of the latter's incapacity, but if he has been induced to enter into the partnership by the infant's fraudulent representation that he is of age, he may dissolve the partnership for that reason.

§ 50. —— After he becomes of age, the infant partner may ratify the partnership transactions and thus become liable for obligations incurred during his minority. His ratification need not be express unless a statute so requires, but may be inferred from his acts and conduct, as from his dealing with the subject-matter of the contract after attaining majority. Whether his continuing to act as a partner after becoming of age is of itself enough to constitute ratification has been doubted.[9] In actions by and against the partnership, the infant partner should usually be made a party, though the English and many of the American courts have held it improper to make an infant partner a defendant in an action against the firm.[10]

6 Lovell v. Beauchamp [1894], Ap. Cas. 607, Burd. Cas. 155; Bush v. Linthicum, *supra;* Shirk v. Shultz (1887), 113 Ind. 571, Gilm. Cas. 125; Yates v. Lyon (1874), 61 N. Y. 344; Pelletier v. Couture (1889), 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Conary v. Sawyer (1899), 92 Me. 463, 43 Atl. 27, 69 Am. St. R. 525; Hill v. Bell (1892), 111 Mo. 35, 19 S. W. 959; Gay v. Johnson (1855), 32 N. H. 167.

7 Adams v. Beall (1887), 67 Md. 53, 8 Atl. 864, 1 Am. St. R. 379, Mechem's Cas. 51. But see Sparman v. Keim (1880), 83 N. Y. 245, Mechem's Cas. 737.

8 See *In re* Dunnigan (1899), 95 Fed. 428; *In re* Duguid (1900), 100 Fed. 274.

9 Upon the question of ratification, see Salinas v. Bennett (1890), 33 S. Car. 285, 11 S. E. 968; Dana v. Stearns (1849), 3 Cush. (Mass.) 372.

10 See 1 Chitty on Pleading, pp. 14 and 50, notes; 1 Lindley on Partn. (2d Am. ed., Ewell), 74 and notes; Osburn v. Farr (1879), 42 Mich. 134, 3 N. W. 299.

§ 51. **Insane persons as partners.**—The effect of insanity upon capacity to become a partner is not easy to state briefly. Mental unsoundness is of many forms, arising from many causes, and existing in many degrees. It may be obvious or it may be occult. It may have been judicially passed upon, or it may still be in the legally debatable stage. All that can be briefly said about it is that the partnership contract of an insane person, not yet judicially determined to be incompetent, is, like his other contracts, usually voidable only and not void; and if the other party was ignorant of the insanity, and the contract has been executed and appears to be fair, the contract of an insane person will not be set aside unless the parties can be restored to their original condition.[11] After an adjudication of insanity, his subsequent contracts are usually held void. An adjudication of insanity before he entered into the partnership may well have a different effect from one made subsequently.

§ 52. **Married women as partners.**—At common law, a married woman was incapable of making contracts, except where she had a separate estate or except where her husband was a convicted felon, or was an alien enemy and abroad, or had abandoned her, or when husband and wife were judicially separated. Her capacity to enter into partnership was subject to the same limitations. In most of the states her incapacity to make contracts has been more or less removed by statute, and she may enter into partnership with persons other than her

11 See Behrens v. McKenzie (1867), 23 Iowa 333, 92 Am. Dec. 428; Fay v. Burditt (1882), 81 Ind. 433, 42 Am. Rep. 142; Jordan v. Kirkpatrick (1911), 251 Ill. 116, 95 N. E. 1099; Burnham v. Kidwell (1885), 113 Ill. 425; Gribben v. Maxwell (1885), 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; Gillet v. Shaw (1912), 117 Md. 508, 83 Atl. 394, 42 L. R. A. (N. S.) 87; Merchant's Nat. Bank v. Coyle (1919), — Minn. —, 174 N. W. 309; Young v. Stevens (1868), 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; Carter v. Beckwith (1891), 128 N. Y. 312, 28 N. E. 582; Blinn v. Schwarz (1904), 177 N. Y. 252, 69 N. E. 542, 101 Am. St. R. 806; Reams v. Taylor (1906), 31 Utah 288, 87 Pac. 1089, 120 Am. St. R. 930, 11 Ann. Cas. 51, 8 L. R. A. (N. S.) 436; McLaughlin v. Daily Telegraph Co. (1904), 1 Austral. Com. L. R. 243. As to the effect of subsequently occurring insanity upon the partnership, see *post*, § 365.

husband under substantially the same conditions which now apply to any other of her contracts.[12] She could not, at common law, be a partner with her husband; and, even under the modern statutes, the same disability still continues in many states.[13] This conclusion is based sometimes upon the insufficiency of the statutes to justify it, and sometimes upon reasons of public policy which are thought to forbid such business relations between husband and wife. A number of states, on the other hand, deny any such reasons of policy, and find, in the broad terms of statutes giving the married woman power to own and control property and to make contracts generally as though she were unmarried, ample capacity to enter into partnership relations even with her own husband.[14]

12 Vail v. Winterstein (1892), 94 Mich. 230, 53 N. W. 932, 34 Am. St. R. 334, 18 L. R. A. 515, Mechem's Cas. 739. *Contra,* in South Carolina, Vannerson v. Cheatham (1894), 41 S. Car. 327, 19 S. E. 614. The question of her husband's consent may be material. It is required by statute in Illinois. See, also, Sanders v. Schilling (1909), 123 La. 1009, 49 So. 689.

13 See Artman v. Ferguson (1888), 73 Mich. 146, 40 N. W. 907, 16 Am. St. R. 572, 2 L. R. A. 343; Mechem's Cas. 61; Gilkerson-Sloss Com. Co. v. Salinger (1892), 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. R. 105; Seattle Board of Trade v. Hayden (1892), 4 Wash. 263, 30 Pac. 87, 16 L. R. A. 530, 31 Am. St. R. 919; Fuller v. McHenry (1892), 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512; Bowker v. Bradford (1885), 140 Mass. 521, 5 N. E. 480; Payne v. Thompson (1886), 44 Ohio St. 192, 5 N. E. 654; Scarlett v. Snodgrass (1883), 92 Ind. 262; Carey v. Burruss (1882), 20 W. Va. 571, 43 Am. Rep. 790; Mayer v. Soyster (1868), 30 Md. 402; Barlow v. Parsons (1901), 73 Conn. 696, 49 Atl. 205; Brown v. Chancellor (1884), 61 Tex. 437.

14 See Suau v. Caffe (1890), 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593, Mechem's Cas. 64; Louisville R. Co. v. Alexander (1894), 16 Ky. L. R. 306, 27 S. W. 981; Belser v. Tuscumbia Banking Co. (1895), 105 Ala. 514, 17 So. 40; Dressel v. Lonsdale (1892), 46 Ill. App. 454; Heyman v. Heyman (1904), 210 Ill. 524, 71 N. E. 591; Lane v. Bishop (1893), 65 Vt. 575, 27 Atl. 499. In Tennessee, see Theus v. Dugger (1893), 93 Tenn. 41, 23 S. W. 135. In Maine, see Bird Co. v. Hurley (1895), 87 Me. 579, 33 Atl. 164; Stewart v. Todd (1919), — Iowa —, 173 N. W. 619; Hoaglin v. Henderson (1903), 119 Iowa 720, 94 N. W. 247, 97 Am. St. R. 335, 61 L. R. A. 756, Gilm. Cas. 121; Morrison v. Dickey (1905), 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87; Burney v. Grocery Co. (1896), 98 Ga. 711, 25 S. E. 915, 58 Am. St. R. 342, Burd. Cas. 11.

Where she may be a partner, her rights and liabilities are substantially the same as in the case of any other partner.[15]

§ 53. Corporations as partners.—A corporation has, as such, under the ordinary statute which confides its management to its own officers and directors, no implied power to enter into partnership either with an individual, a firm, or another corporation.[16] Authority for this purpose must be expressly conferred.[17] But, within its corporate power, a corporation and an individual may so contract as to incur a joint liability without actually entering into partnership.[18]

§ 54. Firms as partners.—With the consent of their members, two or more firms may enter into partnership, and a firm

15 See Burney v. Grocery Co. *supra*, and other cases *supra*.

16 See Whittenton Mills v. Upton (1858), 10 Gray (Mass.), 582, 71 Am. Dec. 681, Mechem's Cas. 68; People v. Sugar Refining Co. (1890), 121 N. Y. 582, 24 N. E. 834, 18 Am. St. R. 843, 9 L. R. A. 33; Gunn v. Railroad Co. (1885), 74 Ga. 509; Hackett v. Multnomah Ry. (1885), 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327; Mallory v. Oil Works (1888), 86 Tenn. 598, 8 S. W. 396; Morris Run Coal Co. v. Barclay Coal Co. (1871), 68 Pa. St. 173, 8 Am. Rep. 159; White Star Line v. Star Line (1905), 141 Mich. 604, 105 N. W. 135, 113 Am. St. R. 551; Geurinck v. Alcott (1902), 66 Ohio St. 94, 63 N. E. 714; Wilson v. Carter Oil Co. (1899), 46 W. Va. 469, 33 S. E. 249. Same, as to national banks: See Merchants' Nat. Bank v. Wehrmann (1906), 202 U. S. 295, 26 S. Ct. 613, 50 L. ed. 1036; California Bank v. Kennedy (1896), 167 U. S. 362, 17 Sup. Ct. 831, 42 L. ed. 198; Merchants' Nat. Bank v. Wehrmann (1903), 69 Ohio St. 160, 68 N. E. 1004, Gilm. Cas. 131.

17 Butler v. American Toy Co. (1878), 46 Conn. 136. Many charters now expressly permit it.

18 In Cleveland Paper Co. v. Courier Co. (1887), 67 Mich. 152, 34 N. W. 556, the court say: "A corporation may, in furtherance of the object of its creation, contract with an individual, though the effect of the contract may be to impose upon the company the liability of a partner." See, also, Boyd v. Amer. Carbon Black Co. (1897), 182 Pa. 206, 37 Atl. 937; Sabine Tram Co. v. Bancroft (1897), 16 Tex. Civ. App. 170, 40 S. W. 837; Bates v. Coronado Beach Co. (1895), 109 Cal. 160, 41 Pac. 855; Wallerstein v. Ervin (1901), 50 C. C. A. 129, 112 Fed. 124; Lehigh Val. R. Co. v. Dupont (1904), 64 C. C. A. 478, 128 Fed. 840; Catskill Bank v. Gray (1851), 14 Barb. (N. Y.) 471, Mechem's Cas. 73. See, also, as to the right of a partnership *de facto* to recover on obligations due it: French v. Donohue (1882), 29 Minn. 111, 12 N. W. 354; Wilson v. Carter Oil Co., *supra*.

may also enter into partnership with one or more individuals. The associating firms may or may not continue to carry on their original and separate businesses. As respects creditors of the joint firm, the associating firms ordinarily lose their separate identity, and each member of each firm is liable as a partner in the joint firm; but as between themselves, for the purposes of accounting and the division of profits or losses, the respective firms may be regarded as the partners.[19]

Where, however, one of the associations or constituent firms carries on a separate business, it will be so far regarded as an entity as that creditors of the joint firm, in seeking to reach the assets of the constituent firm, will be postponed until the creditors of the constituent firm are satisfied.[20]

Where contracts made for the joint firm are within the scope of the business of the associating firms, the contract of one partner in an associating firm made in the firm name will bind all of the partners in that firm, even though he would have had no authority to bind such copartners as individuals in their individual names.[21]

§ 55. Agent, etc., as partner.—An agent, trustee, administrator, and the like, may be a partner. Unless he excluded personal liability by the terms of the contract, he would usually be individually liable for the partnership debts, though he would ordinarily have a remedy for reimbursement or indemnity against the parties by whose authority and on whose account he acted as partner.[22] In accordance with familiar rules, the dis-

19 *In re* Hamilton (1880), 1 Fed. 800; Simonton v. McLain (1885), 37 La. Ann. 663; Bullock v. Hubbard (1863), 23 Cal. 495, 83 Am. Dec. 130; Meyer v. Krohn (1885), 114 Ill. 574, 2 N. E. 495; Meador v. Hughes (1879), 14 Bush (Ky.) 652; Raymond v. Putnam (1862), 44 N. H. 160; McLaughlin v. Mulloy (1897), 14 Utah 490, 47 Pac. 1031, Burd. Cas. 301; *In re* Gilbert (1896), 94 Wis. 108, 68 N. W. 863.

Identity of a constituent firm recognized in bankruptcy: *In re* Knowlton (1912), 196 Fed. 837. In Fordyce v. Shriver (1886), 115 Ill. 530, 5 N. E. 87, the firm was made up of several groups or parties who were not already partners. The members of one group are not liable to the other groups for the negligence of one of that group.

20 See *In re* Gilbert, *supra*.

21 See McLaughlin v. Mulloy, *supra*.

22 See Leckie v. Rothenbarger

closed principal of an agent partner would usually, on the grounds of election, not be liable directly to creditors of the firm, but an undisclosed principal would ordinarily be so liable.

§ 56. How many partners there may be.—In the absence of a statute fixing the limit, the partnership may be composed of any number of partners, though there must, of course, be more than one.[23] In the case of joint stock companies and other partnerships with transferable shares, the partners are often very numerous.

§ 57. Of the delectus personarum.—Partnership being founded on the agreement of the parties, and being a relation demanding mutual confidence and trust, it is clear that a person cannot become a member of a firm without the consent of the other members. Hence, one partner cannot introduce a third person into the firm without the consent of the others,[24] nor upon the death of one partner can his personal representative, merely by virtue of any provisions of the will or the consent or desire of the heirs or next of kin, become a partner with the survivors, except with their consent.[25] A sale of one partner's interest does not, therefore, make his transferee a partner, but ordinarily dissolves the firm.[26]

Consent to the admission of new partners or, in case of death, of the personal representative, may be given in advance, as by being stipulated for in the partnership articles.[27]

To the rule requiring this choice of persons (*delectus personarum*) there are two exceptions—one usually statutory, and the other customary, viz., joint-stock companies and mining partnerships. In these a transfer of one partner's share or

(1899), 82 Mo. App. 615: Morrison v. Dickey (1905), 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87.

[23] Stirling v. Heintzman (1880), 42 Mich. 449, 4 N. W. 165.

[24] Love v. Payne (1880), 73 Ind. 80, 38 Am. Rep. 111; Morrison v. Austin Bank (1905), 213 Ill. 472, 72 N. E. 1109, 104 Am. St. R. 225.

[25] See *post*, § 361; Wild v. Davenport (1886), 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552.

[26] See *post*, § 359.

[27] See Wild v. Davenport, *supra*: McGrath v. Cowen (1898), 57 Ohio St. 385, 49 N. E. 338.

his death does not in fact operate as a dissolution, but his transferee or representative may be received as a partner.[28]

§ 58. Of "sub-partnerships," so-called.—One or more of the partners of a firm may agree with a third person to share with him the interest of such partner or partners in the firm. Such a relationship is frequently called a sub-partnership, and the third person so associating with the partner is often called a sub-partner. "A sub-partnership," says Mr. Justice Lindley,[29] "is, as it were, a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate." The term "sub-partnership," however, is a misnomer. The sub-partnership carries on no business; the sub-partner has none of the authority of a partner; he does not thereby become a partner in the original firm,[30] he is not liable as such to creditors of the original firm,[31] and he has no right of accounting as a partner against the original firm, but only against such members of it as united with him to form the sub-partnership.[32]

28 Kahn v. Smelting Co. (1880), 102 U. S. 641; Skillman v. Lachman (1863), 23 Cal. 198, 83 Am. Dec. 96, and note; Harris v. Lloyd (1891), 11 Mont. 390, 28 Pac. 736, 28 Am. St. R. 475.

29 Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 48.

30 Setzer v. Beale (1882), 19 W. Va. 274; Meyer v. Krohn (1885), 114 Ill. 574, 2 N. E. 495. See Miller v. Rapp (1893), 135 Ind. 614, 35 N. E. 963.

31 Burnett v. Snyder (1880), 81 N. Y. 550, 37 Am. Rep. 527, Mechem's Cas. 157, Ames' Cas. 128, Gilm. Cas. 117; Riedeburg v. Schmitt (1888), 71 Wis. 644, 34 N. W. 336; Setzer v. Beale (1882), 19 W. Va. 274; Morrison v. Dickey (1905), 122 Ga. 353, 50 S. E. 175, 69 L. R. A. 87. *Contra*, Fitch v. Harrington (1859), 13 Gray (Mass.), 468, 74 Am. Dec. 641.

32 The sub-partner may, however, acquire such a vested interest in the assets as to give him the right to an accounting upon dissolution. Nirdlinger v. Bernheimer (1892), 133 N. Y. 45, 30 N. E. 561. "A sub-partnership does not in fact exist where one party furnishes all the capital, receives all the profits, and owns all the assets. Such an arrangement lacks all the essential elements of a partnership. The ostensible partner, in such case, may be held liable to third parties on the ground that he has held himself out as a partner, and they have treated him as such; but he has no interest which will entitle him to an accounting, or to any action at law or in equity against the other party." Webb v. Johnson (1893), 95 Mich. 325, 54 N. W. 947.

CHAPTER IV.

OF THE CONTRACT OF PARTNERSHIP AND THE EVIDENCE THEREOF.

§ 59. No particular formalities required.—No particular formalities are required in entering into the contract of partnership. By the common law, no official act or ceremony is necessary; sealed instruments are not required, and, except in those cases within the operation of the statute of frauds, a written contract, though desirable, is not essential.

Express agreement is not necessary, neither is it essential that the parties shall have had a conscious intention to become partners. The relation may grow out of transactions and dealings in which the word "partnership" was never uttered; if the acts or contracts of the parties in law create partnership, that relation will ensue, even though the parties did not have that result consciously in mind, or though it was consciously in their intention to avoid partnership.[1] The fact that they de-

[1] See Jacobs v. Shorey (1868), 48 N. H. 100, 97 Am. Dec. 586, Mechem's Cas. 164; Duryea v. Whitcomb (1858), 31 Vt. 395, Mechem's Cas. 89; Townley v. Crickenberger (1908), 64 W. Va. 379, 63 S. E. 320; Wade v. Hornaday (1914), 92 Kan. 293, 140 Pac. 870; Johnson v. Carter (1903), 120 Iowa 355, 94 N. W. 850, Gilm. Cas. 54.

No *express* agreement is essential: Davis v. Davis [1894] 1 Ch. 393, Burd. Cas. 12.

No specific intent is essential: Duryea v. Whitcomb, *supra;* Green v. Beesley (1835), 2 Bing. N. C. 108, Ames Cas. 38, Burd. Cas. 20.

clare that their relationship shall not be a partnership will not prevent one if they have in fact created such a relation.[2] Similarly, on the other hand, the fact that the parties call their relation a partnership will not create one if they have omitted the essential ingredients of partnership,[3] though it may be strong evidence of their intention.[4]

Nevertheless, courts are reluctant to "surprise parties into a partnership." As is said in one case,[5] "Every doubtful case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'"

As has already been pointed out, greater effect may be given to the intention of the parties where they alone are involved, than where creditors are claiming against them after reasonably relying on the appearances of partnership.[6]

§ 60. How affected by the statute of frauds—Contracts not to be performed within one year.—Under the fourth section of the statute of frauds, an agreement to form a partnership in the future, which by its terms is not to be performed within one year, or an agreement for a present partnership to continue for more than a year from its commencement, is void if not in writing; though, in either case, if the parties have acted upon the agreement and become partners, their relation will be treated as a partnership at will.[7]

2 See Adam v. Newbigging (1888), 13 App. Cas. 308; McDonald v. Campbell (1905), 96 Minn. 87, 104 N. W. 760; Bestor v. Barker (1894), 106 Ala. 240, 17 So. 389.

3 See Sailors v. Nixon-Jones Printing Co. (1886), 20 Ill. App. 509, Mechem's Cas. 85. Compare President, etc., of Adams Bank v. Rice (1861), 2 Allen (Mass.) 480, with Zuber v. Roberts (1906), 147 Ala. 512, 40 So. 319, Gilm. Cas. 7; Bradley v. Ely (1900), 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. R. 251, Gilm. Cas. 10; Rosenblatt v. Weinman (1909), 225 Pa. 200, 74 Atl. 54.

4 See Huggins v. Huggins (1902), 117 Ga. 151, 43 S. E. 759.

5 Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49, *per* Cooley, J., quoting from Kent, C. J., in Post v. Kimberly (1812), 9 Johns. (N. Y.) 470, 504.

6 See Townley v. Crickenberger, *supra*.

7 See Wahl v. Barnum (1889), 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623; Sanger v. French (1898),

§ 61. —— **Partnership in lands.**—With respect of partnerships in lands, there is some conflict as to the application of the statute. The statute requires that contracts for the sale of lands, and contracts creating interests or estates in land, shall, subject to the exceptions named therein, be evidenced by writing. As to the mere creation of partnerships to deal in land in the future, while a few cases deem writing necessary, the great weight of authority is to the effect that they may be created without writing.[8] Such contracts are neither contracts for the sale of any land nor do they create interests or estates in any particular lands. That question will only arise when land is thereafter acquired. If a valid partnership has been created, and thereafter partnership funds are used to purchase land, the title to which is taken in one partner,[9] or if a partner in such a partnership purchase for himself land which it was his duty to purchase for the partnership, a trust may be established upon

157 N. Y. 213, 51 N. E. 979; Morris v. Peckham (1883), 51 Conn. 128. (But see Shropshire v. Adams (1905), 40 Tex. Civ. App. 339, 89 S. W. 448.)

Such a partnership exists until something is done to dissolve it: Sanger v. French, *supra*, and rights created by acting under it will be enforced, Hammel v. Feigh (1919), — Minn. —, 173 N. W. 570.

[8] See Bates v. Babcock (1892), 95 Cal. 479, 30 Pac. 605, 29 Am. St. R. 133, 16 L. R. A. 745; Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550, Mechem's Cas. 38, Gilm. Cas. 136; Richards v. Grinnell (1884), 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Pennybacker v. Leary (1884), 65 Iowa 220, 21 N. W. 575, Gilm. Cas. 214; Holmes v. McCray (1875), 51 Ind. 358, 19 Am. Rep. 735; Flower v. Barnekoff (1890), 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Garth v. Davis (1905), 120 Ky. 106, 85 S. W. 692, 27 Ky. L. R. 505, 117 Am. St. R. 571; Stitt v. Lumber Co. (1906), 98 Minn. 52, 107 N. W. 824; Morgart v. Smouse (1906), 103 Md. 463, 63 Atl. 1070, 115 Am. St. R. 367, 7 Ann. Cas. 1140; Hammel v. Feigh, *supra;* Thompson v. McKee (1914), 43 Okla. 243, 142 Pac. 755, L. R. A. 1915 A, 521; Howell v. Kelly (1892), 149 Pa. 473, 24 Atl. 224; Beebe v. Olentine (1911), 97 Ark. 390, 134 S. W. 936; Marsh v. Davis (1885), 33 Kan. 326, 6 Pac. 612, Gilm. Cas. 133; Bird v. Wilcox (1919), 104 Kan. 799, 180 Pac. 774 (partnership to deal in oil leases). *Contra:* See Huntington v. Burdeau (1912), 149 Wis. 263, 135 N. W. 845, citing Wisconsin and other cases.

[9] See Fairchild v. Fairchild (1876), 64 N. Y. 471; Tenney v. Simpson (1887), 37 Kan. 353, 15 Pac. 187.

a showing of the facts by parol evidence notwithstanding the statute.[10]

On the other hand, if D, with respect of land which he already owns, agrees without writing to admit P to a partnership interest in it, that agreement would be within the statute.[11] So an agreement by D, there being no existing partnership or partnership funds, to purchase land with his own funds and when bought to admit P to a partnership therein, is equally within the statute.[12]

§ 61a. —— Partnership in chattels.—Somewhat similar questions may arise with respect of chattels, though much less frequently. A contract to admit another to partnership in respect of chattels already owned, or to acquire chattels and convey an interest in them to another, may fall within the seventeenth section of the statute as a contract for the sale of goods, wares or merchandise.[13]

§ 62. Consideration for the contract.—As has been already seen, the contract of partnership, like other contracts, requires to be founded upon some consideration in order to be binding.[14] Any contribution in the shape of capital or labor, or any act

10 See Traphagen v. Burt (1876), 67 N. Y. 30; Moritz v. Lavelle (1888), 77 Cal. 10, 18 Pac. 803, 11 Am. St. R. 229; Miller v. Ferguson (1907), 107 Va. 249, 57 S. E. 649, 122 Am. St. R. 840, 13 Ann. Cas. 138; Floyd v. Duffy (1910), 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883.

11 See Goldstein v. Nathan (1895), 158 Ill. 641, 42 N. E. 72, Burd. Cas. 9; Burgwyn v. Jones (1912), 113 Va. 511, 75 S. E. 188, Ann. Cas. 1913 E, 564, 41 L. R. A. (N. S.) 120; McCormick's Appeal (1868), 57 Pa. 54, 98 Am. Dec. 191; Miller v. Miller (1913), 156 Ky. 267, 160 S. W. 923.

12 See Norton v. Brink (1906), 75 Neb. 566, 110 N. W. 669, 121 Am. St. R. 822, 7 L. R. A. (N. S.) 945; Wiley v. Wiley (1911), 115 Md. 646, 81 Atl. 180, Ann. Cas. 1913 A, 789; Bailey v. Hemenway (1888), 147 Mass. 326, 17 N. E. 645; Dunphy v. Ryan (1885), 116 U. S. 491, 29 L. ed. 703, 6 S. Ct. 486; Robbins v. Kimball (1892), 55 Ark. 414, 18 S. W. 457, 29 Am. St. R. 45; Brosnan v. McKee (1886), 63 Mich. 454, 30 N. W. 107.

13 See Lewin v. Stewart (1858), 17 How. Pr. (N. Y.) 5. Compare Coleman v. Eyre (1871), 45 N. Y. 38, Gilm. Cas. 137.

14 See Mitchell v. O'Neale (1869), 4 Nev. 504.

which may result in liability to third persons, is sufficient for the purpose.[15] The mutual covenants and contributions of the parties are the usual consideration. Their contributions need not, of course, be equal, for the members must be their own judges of the adequacy of the consideration. Neither is it necessary, as between the parties themselves, that the losses shall be shared equally or at all; for, as will be seen,[16] one partner may lawfully agree to indemnify the other against loss by the enterprise.

§ 63. When the contract takes effect.—As has been already seen,[17] a mere intention to form a partnership does not create one; that intention must in some way be given legal operation. It is not, of course, essential that formal instruments shall be executed, and it may be found to have been the intention of the parties to launch the partnership at once, notwithstanding the fact that regular partnership articles are afterwards to be prepared.[18]

Well-drawn partnership articles will name the day upon which the partnership is to begin; but in the absence of such a stipulation, or of any articles whatever, recourse must be had to other evidence. Presumptively in such cases the date of the commencement will be the day on which the agreement is fully and definitely consummated;[19] but the express stipulation of the parties, or the circumstances attending the case, may show either that the partnership is to have a retroactive operation, or that it is not to be deemed to be in force until some event has happened or some precedent condition has been complied with.[20]

15 Lindley on Partnership (2d Am. ed., Ewell), 63.

16 See *post*, § 81.

17 See *ante*, §§ 30, 31.

18 See *ante*, § 31.

19 See Guice v. Thornton (1884), 76 Ala. 466.

20 See Reed v. Meagher (1890), 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; National Bank v. Cringan (1895), 91 Va. 347, 21 S. E. 820; Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. 201, Mechem's Cas. 260, Burd. Cas. 503, Gilm. Cas. 425; Sabel v. Savannah Rail & Equip. Co. (1903), 135 Ala. 380, 33 So. 663, Gilm. Cas. 116; Queen City Furniture Co. v. Crawford (1895), 127 Mo. 356, 30 S. W. 163.

Where there was no element of estoppel, plaintiff was not responsible for the acts of an alleged partner, where the latter was a per-

Conditions of the latter sort, however, may be waived, and, as to third persons especially, will usually be held to be so where the partnership is actually launched before the contemplated time arrives.[21] So, also, where the arrangement contemplates action at once and continuously, a present partnership may exist, though some incidents remain to be agreed upon later.[22]

§ 64. Question of the existence of a partnership usually one of mixed law and fact.—The question whether a partnership exists in a given case is one of mixed law and fact. What constitutes a partnership is a question of law; whether in the given case such facts exist as in law constitute a partnership is a question of fact. If the facts are not admitted, or if more than one inference may reasonably be drawn from them, the case will go to the jury; if the facts are admitted, and only one inference may reasonably be drawn from them, the court will decide the question.[23] Whether a written instrument produced creates a partnership is a question of construction for the court.[24]

son who was to have a share in plaintiff's venture upon paying for it, and who had given a check for it, not accepted as payment, which proved to be worthless: Stundon v. Dahlenberg (1914), 184 Mo. App. 381, 171 S. W. 37.

21 See First National Bank v. Cody (1893), 93 Ga. 127, 19 S. E. 831.

For a striking case in which, as between the parties, no partnership was deemed to have been created, though many preliminary steps had been taken, see Martin v. Baird (1896), 175 Pa. 540, 34 Atl. 809, Mechem's Cas. 744.

For an interesting case as to whether certain parties ever signed the articles or not, see Moore v. May (1903), 117 Wis. 192, 94 N. W. 45.

22 See Kerrick v. Stevens (1884), 55 Mich. 167, 20 N. W. 888, Mechem's Cas. 87.

A provision in a contract, otherwise of present partnership, that if the venture is not a success one party may declare the agreement of no effect, does not prevent a present partnership from arising: Illinois Malleable Iron Co. v. Reed (1897), 102 Iowa 538, 71 N. W. 423.

23 See Morgan v. Farrel (1889), 58 Conn. 413, 20 Atl. 614, 18 Am. St. R. 282, Mechem's Partn. Cas. 171; Everitt v. Chapman (1827), 6 Conn. 347, Gilm. Cas. 68; Waggoner v. First Nat. Bank (1894), 43 Neb. 84, 61 N. W. 112; Kingsbury v. Tharp (1886), 61 Mich. 216, 28 N. W. 94; Stundon v. Dahlenberg (1914), 184 Mo. App. 381, 171 S. W. 37.

24 See Boston Smelting Co. v.

In the ordinary disputed case, the course of procedure will be for the court to instruct the jury as to the considerations which determine partnership and the facts which they must find in order to establish one, and then to leave the whole question of the existence of a partnership and the resulting liability to their determination.

§ 65. Means of proof.—As between the alleged partners themselves, the existence of the partnership may be proved by the partnership articles, if any; if not, by informal writings, letters, the partnership books, the conduct and admissions of the parties, or by any other matters tending to prove the fact in controversy, and brought home to the party to be charged.[25]

As to third persons, the existence of the partnership and the persons who compose it may be proved by conduct, admissions or other kinds of parol evidence, even though there were partnership articles.[26]

The testimony of the parties themselves as to the facts is, under modern rules, admissible either to prove or disprove the alleged partnership.[27]

It may also be proved by the conduct or admissions of the parties sought to be charged;[28] but the acts or admissions of

Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Klosterman v. Hayes (1889), 17 Oreg. 325, 20 Pac. 426; Webster v. Clark (1894), 34 Fla. 637, 16 So. 601, 43 Am. St. R. 217, 27 L. R. A. 126; Rider v. Hammell (1901), 63 Kan. 733, 66 Pac. 1026; Bradley v. Ely (1900), 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. R. 251, Gilm. Cas. 10; McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583.

[25] See 2 Greenleaf on Evidence, § 477 *et seq.;* Lindley on Partnership (Ewell's 2d Am. ed.), vol. I, p. 80 *et seq.;* McMullan v. Mackenzie (1849), 2 Greene (Iowa), 368.

[26] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 87; 2 Greenleaf, § 479.

[27] First National Bank v. Conway (1886), 67 Wis. 210, 30 N. W. 215.

Their testimony as to the facts is competent but their conclusions as to whether there was a partnership are not conclusive. Wilson v. Todhunter (1918), — Ark. —, 207 S. W. 221.

[28] Reed v. Cremer (1886), 111 Pa. 482, 5 Atl. 237, 56 Am. Rep. 295, where it is said that the partnership may be established by the several admissions of all those who were alleged to compose it, or by the admissions of one and the acts and declarations of the others. But

one person are not admissible to prove another to be a partner, unless the latter is in some way shown to be responsible for them or to have acquiesced in them.[29] The existence of the partnership, or who were the persons composing it, cannot be proved by general reputation, rumor or hearsay.[30]

In seeking to establish partnership from acts and conduct, a wide range of evidence is allowed to put before the jury all the facts and circumstances relating to the connection of the alleged partner with the affair, and the method of transacting the business.

§ 66. Burden of proof.—The burden of proving the existence of the partnership and who were the partners composing it rests usually upon the party alleging it.[31] Where, however, its existence is shown or admitted, a presumption of its continuance ordinarily arises which casts upon the party alleging its termination the burden of showing that fact, including the giving of proper notice where that is necessary.[32]

the facts relied upon must be those which the party sought to be held caused or permitted to appear. Morgan v. Farrel (1890), 58 Conn. 413, 20 Atl. 614, 18 Am. St. R. 282, Mechem's Cas. 171. See, also, Boosalis v. Stevenson (1895), 62 Minn. 193, 64 N. W. 380; McDonald v. Campbell (1905), 96 Minn. 87, 104 N. W. 760.

29 The declarations or admissions of one person that another is his partner are not admissible to prove that fact against the latter person, unless he has in some way authorized or assented to such declarations. Vanderhurst v. De Witt (1892), 95 Cal. 57, 30 Pac. 94, 20 L. R. A. 595; Dutton v. Woodman (1852), 9 Cush. (Mass.) 255, 57 Am. Dec. 46; Grafton Bank v. Moore (1842), 13 N. H. 99, 38 Am. Dec. 478; Franklin v. Hoadley (1911), 145 N. Y. App. Div. 228, 130 N. Y. Supp. 47.

30 Brown v. Crandall (1835), 11 Conn. 92; Bowen v. Rutherford (1871), 60 Ill. 41, 14 Am. Rep. 25; Cook v. Slate Co. (1880), 36 Ohio St. 135, 38 Am. Rep. 568; Potter v. Greene (1858), 9 Gray (Mass.), 309, 69 Am. Dec. 290.

31 See Lieb v. Craddock (1888), 87 Ky. 525, 9 S. W. 838; Dunham v. Loverock (1893), 158 Pa. 197, 27 Atl. 990, 38 Am. St. R. 838, Mechem's Cas. 6; *In re* Gibbs' Estate (1893), 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276, Gilm. Cas. 91; Smith v. Moynihan (1872), 44 Cal. 53.

32 See *post*, § 393.

CHAPTER V.

WHAT ACTS AND CONTRACTS CREATE A PARTNERSHIP.

§ 67. How question arises.—The question as to the existence of a partnership between given individuals may arise in two classes of cases:

1. Where the parties themselves allege that they intended partnership.

2. Where the parties or some of them allege that they did not intend partnership, and third persons, usually creditors, are seeking to establish it against them.

The latter is, by far, the more common case.

§ 68. Partnerships inter sese and as to third persons.—It is, in general, true, as has been seen,[1] that as between the parties to the alleged relation there can be no partnership if they did not intend one, and that as to third persons there can be no partnership if there was none as between the alleged partners themselves. Notwithstanding this general rule, it is equally true, as will be hereafter seen, that there are two apparent exceptions to it:

1. Persons may be held, notwithstanding a contrary intention, to have made a contract which in law constitutes them partners as between themselves; and

2. A person who is not actually a partner may be held liable to third persons as though he were a partner where he has so conducted himself as to reasonably induce such third persons to rely upon the assumption that he was a partner.

It will be obvious that these two cases are very different; in the first all the parties are held to be partners *as between themselves*, while in the second a person may be held liable as though he were a partner when in fact, between him and the persons with whom he is thus assumed to be a partner, no actual partnership existed. The first form, or the partnership *inter sese*, is therefore the only true partnership. This has sometimes led to a classification into, 1, true partnerships, and 2, *quasi*-partnerships, though the latter are not partnerships at all. The proper classification is into, 1, true partnerships with their resulting liabilities, and, 2, liability as a partner where no actual partnership exists.

I. Of True Partnerships.

§ 69. True partnerships, how classified.—It will be evident that true partnerships also may be divided into two classes: 1.

[1] See *ante*, § 59.

Where a partnership was expressly intended; and 2. Where the parties did not expressly intend to become partners, but the law holds that the contract which they intentionally made does create a partnership between them, and their relation thus becomes, indirectly, in law an intentional partnership, because it is said that the law always presumes that parties intended the legal result of their intentional acts. These two classes will be separately considered.

§ 70. I. Of partnerships expressly intended.—Cases of this nature can ordinarily occasion but little difficulty. If it be admitted that the parties intended to be partners, their intention can rarely fail of effect. Cases, however, are occasionally found in which the parties, intending to create a partnership and expressly naming their relation such, have still been held not to have created one, because they had failed to attach to their relation the necessary incidents of partnership; as, for example, where their contract leaves them without any community of interest in the business or profits.[8]

It may also be that an instrument designed to constitute partnership articles is so defectively drawn as to create some other relation, as a co-ownership or a corporation; but unless some other distinct relation is thus expressly created, or some indispensable element is omitted, persons who have intended to be partners, and who have acted as such, will be deemed to be partners notwithstanding defective instruments.

[8] Thus, in Sailors v. Nixon-Jones Printing Co. (1886), 20 Ill. App. 509, Mechem's Cas. 85, it is said: "The fact that the parties to such relation themselves call it a partnership will not make it so. Where the question of partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet, if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners in fact or in law. Parsons on Partnership, 91. A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fixes the real status of the parties toward each other."

§ 71. II. Of agreements held to create partnership inter sese when that was not intended.—The question whether a partnership has in fact been created between two or more persons, part or all of whom deny it, may arise in a great variety of cases. It is constantly arising as between the alleged partners and third persons who are seeking to hold them liable as such, and this phase of the question presents the most difficulty and gives rise to the greatest amount of litigation.

The question, however, may and often does arise as between the alleged partners themselves. As between these parties, the question usually arises in one of two classes of cases: 1. Where an affair in which they have been in some way concerned has proven to be profitable, and one or more, alleging partnership, seek to compel an accounting, as partners, from the others, who deny it; and 2. Where such an enterprise has proved disastrous, and one or more alleging partnership seek to enforce contribution as partners from the others, who deny that any such relation existed.[3] Other cases may, of course, arise where one or more claim other rights or powers as partners against the others, but the two classes of cases stated are the most common.

§ 72. Legal intention of parties controls.—Partnership, as has been seen, is the result of the express or implied agreement of the parties, and there can be no partnership—either as between the parties themselves or as to third persons—where the parties have not by their acts or contracts created one. When, therefore, the parties themselves, or some of them, deny that they intended to form a partnership, it becomes necessary to determine what is the legal effect of their acts and contracts. In dealing with this question, it must be borne in mind that it is the *legal* intention of the parties rather than their *expressed* or declared intention which controls. The law, it is said, presumes that the parties intend the legal consequences of their voluntary acts and contracts. If, therefore, they intend the acts or contracts, they intend also, in contemplation of law, the legal effect of those acts and contracts.[4] Whether, then, the

[3] See McDonald v. Fleming (1913), 178 Mich. 206, 144 N. W. 519.

[4] Thus in Duryea v. Whitcomb (1858), 31 Vt. 393, Mechem's Cas. 89, Gilm. Cas. 13, the court says:

question arises between the parties themselves, or between the parties and third persons, if the legal effect of their acts and contracts is the creation of a partnership, the parties will be deemed partners, notwithstanding their denial of an intention to become such. The law gathers their intention from their acts and contracts at the time, rather than from their contemporaneous or subsequent assertions. Greater effect may, however, be given to the expressed intentions of the parties when the question arises between themselves only, than where third persons are concerned.[5] The latter cannot be presumed to know of the declared intention, and must therefore be left to judge by the legal intention which the outward acts and contracts of the parties manifest. In doubtful cases, however, of either sort, the expressed intention may be of consequence, and may even turn the scale in accordance with it.

§ 73. Same subject.—Keeping these distinctions in view, it is then true, as the rule is frequently declared, that whether a partnership has been created depends upon the real intention of the parties. If their agreement is in writing, its true construction must be ascertained. If it is not in writing, then the

"If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. * * * Probably the fair construction of the report is that the parties were not aware of the legal extent and obligation of the contract into which they entered. As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses." See, also, Chapman v. Hughes (1894), 104 Cal. 302, 37 Pac. 1048; Spaulding v. Stubbings (1893), 86 Wis. 255, 56 N. W. 469, 39 Am. St. R. 888, Mechem's Cas. 149; Magovern v. Robertson (1889), 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589, Mechem's Cas. 154; Bradley v. Ely (1900), 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. R. 251, Gilm. Cas. 10; Wade v. Hornaday (1914), 92 Kan. 293, 140 Pac. 870; Illinois Malleable Iron Co. v. Reed (1897), 102 Iowa 538, 71 N. W. 423.

5 See McDonald v. Fleming, *supra;* Fechteler v. Palm Bros.

intention of the parties must be gathered from their words and conduct. What the parties have called themselves is not conclusive, for if they have stipulated for what is a partnership in fact, then even their express agreement that they should not be partners would not prevent the legal operation of their stipulations.[6] If, on the other hand, their acts and contracts do not in law create a partnership, the fact that they have expressly called it such will not make it one.[7]

§ 74. Tests of intention to form partnership.—While the intention of the parties is thus, in general, the controlling inquiry, there are a number of methods by which the courts have endeavored to ascertain what that intention was. Keeping in mind the definition that the partnership relation is based upon the agreement of the parties to unite their property, labor, capital or skill in carrying on business as co-owners or principals for their joint profit, each being at the same time both principal of and agent for the other,[8] several of the tests which are com-

(1904), 66 C. C. A. 336, 133 Fed. 462; Hitchings v. Ellis (1859), 12 Gray (78 Mass.) 449.

6 Thus in Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49, after calling attention to the fact that in that case the parties manifestly had no purpose to become partners, it is said by Cooley, J.: "In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts and upon special equities. It is, nevertheless, possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent, otherwise we should carry the doctrine of constructive partnership so far as to render it a trap to the unwary. Kent, C. J., in Post v. Kimberly, 9 Johns. (N. Y.) 470, 504."

7 Sailors v. Nixon-Jones Co. (1886), 20 Ill. App. 509, Mechem's Cas. 85; Oliver v. Gray (1842), 4 Ark. 425, Burd. Cas. 16.

8 "As said in McDonald v. Campbell (1905), 96 Minn. 87, 104 N. W. 760, there is no arbitrary test by which to determine when a partnership exists. It depends upon the in-

monly applied to aid in determining when such an agreement exists may be noticed. Among these are—

§ 75. I. Agreements to share both profits and losses.—An agreement between two or more persons to unite their property, labor, skill, or capital to establish and carry on a business, in which business they are to have a community of interest—which they are to *own* in common, in which each is to be a principal owner or proprietor as distinguished from a mere agent, clerk or creditor—and the profits and losses of which they are to share because they *are* such owners, principals or proprietors, is the typical form of partnership. Such an agreement creates a partnership between the parties as a matter of law.

§ 76. Same subject.—Agreements, however, which present all of these characteristics occasion no difficulty, and the question of partnership is easily and certainly solved. The difficulty arises in those cases—which unfortunately but naturally constitute the great majority of those submitted to lawyers or courts for determination—in which *some* of these elements only are discernible, while others are not apparent at all or are to be extracted from a mass of more or less conflicting facts and circumstances. In such cases, the elements which *do* appear are not necessarily conclusive, and it is both unwise and dangerous to seize upon them as sufficient; they are *evidence* merely, and, as such, are more or less convincing according as they fit in with the remaining elements discovered.

Of this nature is the *mere* element of sharing profits and

tention of the parties, and this intention must be ascertained from the evidence and all the circumstances of the case. If the evidence shows that the parties intended to combine their property, labor and skill as principals for the purpose of enjoying the profits, it establishes a partnership. The question always is, was there a joint business, or were the parties carrying on the business as principals and agents? If there is a joint business, it naturally follows that the parties were to share the profits in some proportion, and hence an agreement to share profit is strong evidence that the enterprise was to be conducted as a joint undertaking." McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583.

losses. It certainly furnishes strong evidence that the parties have united as principals for their joint profit, if any, and in the absence of anything to show that the profits and losses were to be shared on some other basis than that of principals in the business, it would usually be deemed conclusive.[9] But it may still be shown that they were to share the profits and losses in some other capacity, and the evidence of partnership is thereby weakened if not dispelled. Where both parties contribute goods, or money to buy goods, for a common stock, in which they thus acquire a joint interest, then an agreement for a division of the profit and loss furnishes the strongest evidence of a partnership; and the same is true where each is to contribute services.

§ 77. Same subject.—The evidence is also strong where one furnishes money or property and the other furnishes services, though it is less strong in this case than in the others, because the parties have not necessarily a joint interest in the property, and the sharing in profits and loss may be but one means of compensating the second party for his services. Still less strong is the evidence where, though the parties are to share profits and losses in the sale of goods, each one retains the individual title or control of his contribution.

To constitute a partnership, therefore, there must be added to the evidence of this one element of sharing profits and losses, the further evidence that the parties who so shared in such profits and losses were also principal proprietors in the business from which such profits or losses ensued, and that such sharing was because they stood in the relation of such principal proprietors and not in some other relation.[10]

[9] Such an arrangement, it is frequently said, raises a *prima facie* case of partnership. See, *e. g.*, Torbert v. Jeffrey (1901), 161 Mo. 645, 61 S. W. 823; Illinois Malleable Iron Co. v. Reed (1897), 102 Iowa 538, 71 N. W. 423.

[10] See Canton Bridge Co. v. City of Eaton Rapids (1895), 107 Mich. 613, 65 N. W. 761, Mechem's Cas. 758, Burd. Cas. 90; Fechteler v. Palm (1904), 66 C. C. A. 336, 133 Fed. 462, Gilm. Cas. 76; Spaulding v. Stubbings (1893), 86 Wis. 255, 56 N. W. 469, 39 Am. St. R. 888, Mechem's Cas. 149; Culley v. Edwards (1884), 44 Ark. 423, 51 Am. Rep. 614; Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Clifton v. Howard (1886), 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97, Burd. Cas. 88; Torbert v. Jeffrey

§ 78. II. **Agreements to share profits, nothing being said about losses.**—It not infrequently happens that, while the element of profit sharing is clearly evident, the question of sharing losses appears to have been ignored. The failure or omission to provide for the losses may have been accidental or intentional. If it was accidental merely, it is ordinarily of little consequence, because the law will supply the omission if the other elements are present, by assuming that the losses, like the profits, were to be shared equally.[11] But if the omission was intentional, it challenges inquiry, though it may not be conclusive. Ordinarily one who shares the profits of the business because he is a principal therein, must, for the same reason, share the losses also if loss results. But it is possible that one may share the profits of a business without being a proprietor therein. The facts must therefore be investigated further, and it must be ascertained why and in what relation the profits are to be received.

§ 79. **Same subject.**—Pursuing the investigation, if it be found that the parties have contributed to form a joint stock

(1901), 161 Mo. 645, 61 S. W. 823; Hughes v. Ewing (1901), 162 Mo. 261, 62 S. W. 465; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607; Gulf City Co. v. Boyles (1900), 129 Ala. 192, 29 So. 800; Thillman v. Benton (1895), 82 Md. 64, 33 Atl. 485. In a leading case in Oregon (Flower v. Barnekoff (1890), 20 Ore. 137, 25 Pac. 370, 11 L. R. A. 149), it is said: "Partnership and community of interest independently considered are not always the same thing, nor is a mere community of interest sufficient; but there must be an agreement to share the profits and loss, and such profits must be shared as the result of the adventure or enterprise, in which both are interested, and not simply as a measure of compensation (Cogswell v. Wilson, 11 Ore. 372, 21 Pac. 388);" and "where it appears that there is community of interest in the capital stock, and also a community of interest in the profits and loss, there it is clear an actual partnership exists between the parties. Berthold v. Goldsmith, 24 How. (U. S.) 541."

One who loans money to a partner to put into the business, and takes security upon his interest in the business, has not thereby such a community of interest in the business as makes him a partner with the others. Fish v. Thompson (1895), 68 Vt. 273, 35 Atl. 174, Burd. Cas. 3.

11 See Sawyer v. Worthington (1856), 28 Vt. 733; Quinn v. Quinn (1889), 81 Cal. 14, 22 Pac. 264; Wipperman v. Stacy (1891), 80 Wis. 345, 50 N. W. 336, Mechem's Cas. 376; McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583.

or capital of property or skill or labor, and have in the business a community of interest, then an agreement to share profits furnishes very strong evidence of partnership. But if one party only is to supply the stock or capital, the case is not so clear, though it is not conclusive. If, notwithstanding the fact that one is to furnish all the capital in the first instance, it still appears that the parties are to own the business in common, or are to have a common interest in or power of control over it, there is then the community of interest which ordinarily constitutes partnership;[12] but if there is to be no co-ownership of

12 This distinction is illustrated in such cases as Magovern v. Robertson (1889), 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589, Mechem's Cas. 154, where the parties held liable as partners had not only a right to share in the profits but had also, by the express terms of the contract, an interest in the stock and business to the extent of their loans and indorsements. "Persons," said the court, "having a proprietary interest in a business and in its profits are liable as partners to creditors." To like effect, because the alleged clerk was not only to have a share of the profits as compensation, but was also to have an interest in the stock and business itself: Sawyer v. First National Bank (1894), 114 N. C. 13, 18 S. E. 949; Hackett v. Stanley (1889), 115 N. Y. 625, 22 N. E. 745, Burd. Cas. 57, Gilm. Cas. 27; and because the alleged loaner of money was also to have an interest in and control over the business: Spaulding v. Stubbings (1893), 86 Wis. 255, 56 N. W. 469, 39 Am. St. R. 888, Mechem's Cas. 149.

Care must therefore be taken to discriminate between the cases of alleged loans with a share of the profits by way of interest, and a real partnership disguised as a loan; for if it appears that the transaction is a mere device to obtain the advantages of a partnership without the responsibilities, it will be held to be a partnership whatever the parties may have called it. The test is usually to be found, according to the later cases, in the powers of control of the alleged lender. Has he any voice or part in controlling the management of the business as a principal therein? Has he, by virtue of the arrangement, such an interest in the business that he can be regarded both as principal and agent for the others? See Rosenfield v. Haight (1881), 53 Wis. 260, 10 N. W. 378, 40 Am. Rep. 770; Richardson v. Hughitt (1879), 76 N. Y. 55, 32 Am. Rep. 267; Leggett v. Hyde (1874), 58 N. Y. 272, 17 Am. Rep. 244, Burd. Cas. 50, Gilm. Cas. 22; Hackett v. Stanley, *supra;* and especially, Waverly Nat. Bank v. Hall (1892), 150 Pa. St. 466, 24 Atl. 665, 30 Am. St. Rep. 823, Mechem's Cas. 145, and Magovern v. Robertson, *supra.* In *Ex parte* Briggs (1833), 3 Deac. & Ch. 367, Burd. Cas. 3, Gilm. Cas. 4, a distinction was made between the case

the business and one is to receive his share of the profits in some other capacity than as a principal proprietor, as, for example, if he is to receive it as compensation for his services, there is no partnership. Plainly, also, one who has a share of the profits in another's business by way of commission merely, or in lieu of salary, or as rent, or as interest on loans, and the like, is not a partner with the owner of that business.[18] To make the parties

in which the stipulation for a share in the profits was made at the time of the loan, and the case where it was made afterwards. It is less likely to be a partnership in the latter case. So care must be taken to discriminate between a real lease of premises and a partnership disguised under the form of a lease; for if the characteristics of a partnership are present, it will be held to be such regardless of what the parties may have called it. Webster v. Clark (1894), 34 Fla. 637, 16 So. 601, 43 Am. St. R. 217, 27 L. R. A. 126 Merrall v. Dobbins (1895), 169 Pa. 480, 32 Atl. 578, Burd. Cas. 86; Leavitt v. Windsor Land Co. (1882), 4 C. C. A. 425, 54 Fed. 439.

18 See Shepard v. Pratt (1876), 16 Kan. 209; Sodiker v. Applegate (1884), 24 W. Va. 411, 49 Am. Rep. 252, Gilm. Cas. 5; Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49; Drilling v. Armstrong (1910), 94 Ark. 505, 127 S. W. 725; McDonnell v. Battle House Co. (1880), 67 Ala. 90, 42 Am. Rep. 99; Harvey v. Childs (1876), 28 Ohio St. 319, 22 Am. Rep. 387, Mechem's Cas. 129; Thayer v. Augustine (1884), 55 Mich. 187, 20 N. W. 898, 54 Am. Rep. 361; Morgan v. Farrel (1890), 58 Conn. 414, 20 Atl. 614, 18 Am. St. R. 282, Mechem's Cas. 171; Waverly Nat. Bank v. Hall (1892), 150 Pa. St. 466, 24 Atl. 665, 30 Am. St. R. 823, Mechem's Cas. 145; Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Estabrook v. Woods (1906), 192 Mass. 499, 78 N. E. 538; Parchen v. Anderson (1885), 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Culley v. Edwards (1884), 44 Ark. 423, 51 Am. Rep. 614; Waggoner v. First Nat. Bank (1894), 43 Neb. 84, 61 N. W. 112; Jeter v. Burgwyn (1893), 113 N. Car. 157, 18 S. E. 113. One who loans money to a man engaged in manufacturing and selling a patent medicine, with the understanding that the sum loaned should be used to buy ingredients which should be made up into the medicine, and the latter sold by the proprietor in the usual way; and that the lender should have one-fourth of the profits, is not thereby made a partner with the proprietor: Salter v. Ham (1865), 31 N. Y. 321.

In respect of sharing profits by way of compensation for services, it was said in Sodiker v. Applegate, *supra:* "In all cases there must be a participation as principals. If the persons merely occupy the relation of principal and agent, employer and employee or factor, no partnership can be predicated upon the fact that such agent, employee or factor receives a part or share of the profits for his service or other benefits

partners, there must be here, as in the former case, a community of interest *in the business* itself as principals—or co-owners—each one being at once principal of and agent for the others.

A mere *economic* interest in the business is not enough:—a lender or landlord or employee who realizes that he is not likely to get his money unless the business succeeds, may have that,—there must be a *proprietary* interest.

§ 80. Same subject.—The Uniform Partnership Act declares the same rule.[14] "The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:—

(*a*) As a debt by installments or otherwise,

(*b*) As wages of an employee or rent to a landlord,

(*c*) As an annuity to a widow or representative of a deceased partner,

(*d*) As interest on a loan, though the amount of payment vary with the profits of the business,

(*e*) As the consideration for the sale of the good-will of a business or other property by installments or otherwise."

conferred. This proposition is illustrated by numerous cases, among which are the following: Berthold v. Goldsmith, 24 How. (U. S.) 542; Burckle v. Eckhart, 1 Denio (N. Y.) 341; Bowyer v. Anderson, 2 Leigh (Va.) 550; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec. 766; Dils v. Bridge, 23 W. Va. 20; Hanna v. Flint, 14 Cal. 73; Morgan v. Stearns, 41 Vt. 397." One who manages a business for another on the understanding that he is "to have a living out of the business," and, if it proves profitable, a half of the profits, is not thereby made a partner. Whitney v. Bank (1897), 50 Neb. 438, 69 N. W. 933, Burd. Cas. 7. See, also, Zuber v. Roberts (1906), 147 Ala. 512, 40 So. 319, Gilm. Cas. 7; Buzard v. Bank of Greenville (1886), 67 Tex. 83, 2 S. W. 54, 60 Am. Rep. 7; Ross v. Burrage (1919), — Mass. —, 124 N. E. 267, reaffirming Denny v. Cabot (1843), 6 Metc. (47 Mass.) 82; Price v. Alexander (1850), 2 Greene (Iowa) 427, 52 Am. Dec. 526. Even if a person could be held to be a partner as to a particular transaction by reason of having furnished money for it in consideration of a share of its profits, this would not make him a partner as to other transactions. Jeter v. Burgwyn, *supra*.

14 Sec. 7, subd. 4.

§ 81. III. Agreements to share profits with express stipulation against losses.—Agreements are sometimes made by which, though all are to share in the profits, some of the parties are expressly to be protected against loss. Such an agreement may constitute a partnership if the other elements are present. It is lawful for the partners, as between themselves, to stipulate that one or more of them shall be indemnified against loss, though such a stipulation cannot affect the liability of the partners so indemnified to third persons.[15]

It is true that cases are sometimes found which declare that liability for losses, as well as participation in the profits, is indispensable to partnership;[16] but the proposition that the partners may, so far as they themselves are concerned, agree that the partnership liability of one shall be borne by the other, is sustained by the weight of authority.

§ 82. IV. Partnership in profits only.—It is not indispensable that there shall be a common stock or fund of goods, land or other *tangible* property. The contributions of one or both of the partners may be simply skill or experience or capacity to labor. Even if tangible property is necessary to the transaction of the business, it is not essential that it shall be owned by all or any of the partners. It may be hired from a stranger, or one partner may supply its *use* to the firm, retaining the *title* in himself. It may be also that the contract contemplates a division only in case there are profits made, and that, if there

15 See Brown v. Tapscott (1840), 6 Mees. & Welsby, 119, Ames' Cas. 468; Clift v. Barrow (1888), 108 N. Y. 187, 15 N. E. 327, Burd. Cas. 93; Pollard v. Stanton (1845), 7 Ala. 761; Consolidated Bank v. State (1850), 5 La. Ann. 44; Baxter v. Hart (1894), 104 Cal. 344; 37 Pac. 941; Robbins v. Laswell (1862), 27 Ill. 365.

Art. 2814 of Louisiana Civil Code (see Appendix), declares such a stipulation void even as between the partners only; but the court in Consolidated Bank v. State, *supra*, declared that this would not be true where the agreement was based upon a good consideration. Compare, however, *In re* Mitchell-Borne Const. Co. (1919), 145 La. —, 82 So. 377.

16 See Winter v. Pipher (1895), 96 Iowa 17, 64 N. W. 663; Johnson v. Carter (1903), 120 Iowa 355, 94 N. W. 850, Gilm. Cas. 54; McCarney v. Lightner (1920), — Iowa —, 175 N. W. 751.

are no profits, the expenses or losses are to be borne by one only or by both in their individual capacity. Each of these cases, and others of like kind which are legally possible, contemplate co-ownership only in the results of the enterprise rather than in the enterprise itself or the means of conducting it, and they are frequently, though perhaps not very appropriately, spoken of as partnerships in the profits only.

Such a partnership differs from others in degree only and not in kind. To the extent of the community of interest—whether it be in profits only or more—there is a partnership with its incident rights and liabilities.[17]

§ 83. V. **Agreements to share gross returns.**—Persons who contribute property or funds for a common enterprise and agree to share the gross returns of that enterprise in proportion to their contributions, but who severally retain the title to their respective contributions, are not thereby rendered partners. They have no common stock or capital, and no community of interest as principal proprietors in the business itself from which the proceeds are derived.

Thus, co-owners who divide the earnings of a chattel are not thereby necessarily made partners; nor are sailors who divide the products of a voyage; or persons farming land on shares; or two or more owners of connecting coach-lines, who establish a through traffic over their respective lines, and pay their own expenses, but divide the gross receipts of the through business in some agreed proportion; or two or more railroad companies who unite to form a continuous line of carriage, each paying its own expenses but dividing the receipts in proportion to the length of their respective lines; or the lessee and the manager of a theater who share the gross receipts; or workmen who build a chattel together for sale and divide the proceeds; or persons one of whom furnishes a farm or a mill or a brick-yard and the other supplies the labor and materials to operate it and who divide the product; or persons who casually and not as a business unite to buy land or chattels to be sold when the price ad-

17 See Robbins v. Laswell (1862), 27 Ill. 365; Stevens v. Faucet (1860), 24 Ill. 483; Voorhees v. Jones (1861), 29 N. J. L. 270.

vances and agree to divide the proceeds; or persons one of whom furnishes a plant or outfit while the other runs it, the proceeds being divided. Neither is a person a partner who leases property for a share in the gross receipts, as where one lets a hotel or a vessel or machinery, receiving a share of the returns as rent.[18]

[18] See French v. Styring (1857), 2 Com. B. (N. S.) 357, Mechem's Cases on Partn. 1069, Ames Cas. 41, Burd. Cas. 22; (dividing the earnings of a race-horse); Mair v. Glennie (1815), 4 Maule & Sel. 240 (sailors); Champion v. Bostwick (1837), 18 Wend. (N. Y.) 175, 31 Am. Dec. 376, Ames Cas. 110; Eastman v. Clark (1873), 53 N. H. 276, 16 Am. Rep. 192; Pattison v. Blanchard (1851), 5 N. Y. 187 (coach-owners); Irvin v. Railroad Co. (1879), 92 Ill. 103, 34 Am. Rep. 116 (railroad companies); Lyon v. Knowles (1863), 3 Best & Sm. 556 (theater); Hawkins v. McIntyre (1873), 45 Vt. 496 (workmen); Nelms v. McGraw (1890), 93 Ala. 245, 9 So. 719; Robinson v. Bullock (1877), 58 Ala. 618 (mill); Lamont v. Fullam (1882), 133 Mass. 583 (brick-yard); Bruce v. Hastings (1868), 41 Vt. 380; Munson v. Sears (1861), 12 Iowa 172 (land cases): [But there may be a partnership in buying land to sell again. See Flower v. Barnekoff (1890), 20 Ore. 132, 25 Pac. 370, 11 L. R. A. 149; Bates v. Babcock (1892), 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. R. 133.] Goell v. Morse (1879), 126 Mass. 480, Mechem's Cas. 767, Burd. Cas. 23 (chattel to be resold); Quackenbush v. Sawyer (1880), 54 Cal. 439, Mechem's Cas. 768, Burd. Cas. 25 (circus run by one and income divided); Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49; O'Donnell v. Battle House Co. (1880), 67 Ala. 90, 42 Am. Rep. 99; Miles Co. v. Gordon (1894), 8 Wash. 442, 36 Pac. 265 (hotel cases); Cutler v. Winsor (1828), 6 Pick. (Mass.) 335, 17 Am. Dec. 385 (vessel); Day v. Stevens (1883), 88 N. C. 83, 43 Am. Rep. 732; Putnam v. Wise (1841), 1 Hill (N. Y.) 234, 37 Am. Dec. 309; Donnell v. Harshe (1877), 67 Mo. 170, Burd. Cas. 30n, Gilm. Cas. 63; Reynolds v. Pool (1881), 84 N. C. 37, 37 Am. Rep. 607, Burd. Cas. 30n; Blue v. Leathers (1853), 15 Ill. 32; Logan v. Mill Co. (1904), 14 Okla. 402, 79 Pac. 103; Wagner v. Buttles (1913), 151 Wis. 668, 139 N. W. 425, Ann. Cas. 1914 B, 144; Cederberg v. Guernsey (1899), 12 S. Dak. 77, 80 N. W. 159; Williams v. Rogers (1896), 110 Mich. 418, 68 N. W. 240; Bradley v. Ely (1900), 24 Ind. App. 2, 56 N. E. 44, 79 Am. St. R. 251, Gilm. Cas. 10 (farming on shares); Hagenbeck v. Arena Co. (1893), 59 Fed. 14; Pulliam v. Schimpf (1893), 100 Ala. 362, 14 So. 488; McDonough v. Bullock (1874), 2 Pears. (Pa.) 191 (landowner who furnishes site, and show or shooting-gallery proprietor who furnishes means of amusement, and divide proceeds); Dutcher v. Buck

§ 84. VI. Agreements to share losses only.—An agreement to share losses or expenses only does not usually constitute a partnership. Thus, an agreement between two railroad companies that any injury to persons or goods on the line of either shall be borne by the company on whose road it occurs, and that when the place of injury cannot be determined the loss shall be borne by both in the proportions in which they share the through rates for carriage, does not make the companies partners.[19]

II. Of So-called Quasi-Partnerships, or, More Properly, of Liability as a Partner When No Partnership Actually Exists.

§ 85. Of partnerships as to third persons.—Whenever there is a partnership as between the parties,—and this, as has been seen, is the only true partnership,—there is also necessarily a partnership as to third persons, with its incidental rights and liabilities.

It is, however, entirely settled that a given individual may be made subject to the liabilities of a partner when in fact, as between himself and the persons with whom he was supposed to be a partner, no partnership existed or was intended. This presumed relation is sometimes, though inaccurately, spoken of as a partnership as to third persons to distinguish it from the partnership between the parties. It is, however, strictly not a partnership at all, for it does not follow because one person is held liable to another as a partner that the same conclusion involves a finding that, as between himself and his alleged partners, a partnership existed with its consequent rights and obligations.

Two distinct grounds of liability as a partner to third persons have at times been insisted upon and require consideration. One, now practically obsolete, was that of sharing profits; the other,

(1893), 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776, Mechem's Cas. 749; McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583 (lumbering contracts).

19 See Aigen v. Railroad Co. (1882), 132 Mass. 423; Irvin v. Railroad Co. (1879), 92 Ill. 103, 34 Am. Rep. 116.

as important now as ever, is that of holding oneself out as a partner.

1. *Of Sharing Profits.*

§ 86. Sharing profits was formerly a ground of liability to third persons as a partner.—It was laid down at an early period in England, in two cases, Grace v. Smith,[20] and Waugh v. Carver,[21] which have since become famous in the law of partnership, that all persons who shared the profits of a business were liable as partners therein, although as between themselves no partnership existed or was contemplated.

The rule and the reason given for it are well illustrated in the second of these cases. It appeared that one Carver and his son, who were established in business at Gosport, had entered into an agreement with one Giesler, who was in the same business at Plymouth, in pursuance of which he was to remove and establish himself in the same line of business at Cowes. Each concern was to send business to the other when possible. In consideration of the Carvers' recommendation and support, Giesler agreed to pay them one-half of his receipts on certain lines of business. Similarly, the Carvers were to pay him a portion of their receipts on certain lines of business. It was expressly stipulated that neither concern was to be liable for the losses of the other, and that each was to be separate and distinct from the other, but once in each year the parties were to get together and divide the proceeds of the business in accordance with the agreed rates. There was no common firm name and no holding out by one of the other as a partner. Giesler incurred indebtedness in his own name, to the plaintiff, who knew nothing of the arrangement, and for this it was sought to make the Carvers responsible as partners. Lord Chief Justice Eyre, who delivered the opinion of the court, admitted that it was "plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were

20 Grace v. Smith (1775), 2 Wm. Blackstone 998, Mechem's Cas. 93, Ames' Cas. 1; Burd. Cas. 46, Gilm. Cas. 17.

21 Waugh v. Carver (1793), 2 H. Blackstone 235, 2 Smith's Lead. Cas. 1316, Mechem's Cas. 99, Ames' Cas. 6, Burd. Cas. 47, Gilm. Cas. 19.

not, nor ever meant to be, partners." "They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace v. Smith,[22] he who takes a moiety of all

[22] In Grace v. Smith, the facts were that Grace had sued Smith alone as a secret partner with one Robinson, for goods delivered to the latter, who became bankrupt in 1770. It appeared that on March 30, 1767, Smith and Robinson had formed a partnership for seven years, but in the following November it was dissolved and due notice was given. On the dissolution it was agreed that all the stock in trade and debts due the firm should be transferred to Robinson; that Smith was to have back £4,200 which he brought into the business and £1,000 for profits up to that time; that Smith was to permit £4,000 of this money to remain as a loan to Robinson for seven years at five per cent. and an annuity of £300 per annum, for all which Robinson gave bond to Smith. Smith afterwards made further advances until the whole indebtedness amounted to £7,000, for which a new bond was given. The plaintiff contended that this arrangement made Smith a secret partner, but he was held not to be so liable. Said De Grey, C. J.: "The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be lent *de novo* or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference.

the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason." The Carvers were therefore held liable.

§ 87. Same subject.—It does not seem to have occurred to the court that the profits are *not* the fund, that is, the only or chief fund to which the creditors may resort, because, as will be seen, whether there are profits or not, the creditors may resort to *all* of the assets of the firm for payment, as well as to the individual responsibility of the partners. Neither was it observed that the very statement of the rule involved an inconsistency. Profits are what is left *after* the creditors are paid and not *before;* and therefore to take account of profits as such while the creditors yet remain unpaid was an inconsistency. Neither was it observed that the rule often resulted in compelling one creditor, though for a small amount, to stand liable as a partner to the other creditors, even in an indefinite amount. Whatever were the inconsistencies, however, as they have often since been pointed out, this was declared to be the rule, and it remained the rule in England for many years, and was adopted

I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial." Gould, J., of same opinion. Blackstone, J.: "Same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount." Nares, J., of same opinion.

thence into the United States, and has been reiterated and affirmed in many American cases.[23]

Under this rule it mattered little what was the name or nature of the arrangement under which the parties were related, or however strongly they asserted their intention not to be partners, or to what devices they had recourse to avoid such a conclusion; if they shared profits *as profits*, as the expression was, they were declared to be partners as to third persons and liable as such.

§ 88. Of the case of Cox v. Hickman.—In 1860 a case arose in the English courts which required a re-examination of the ground of liability by sharing profits. This was the case of Cox v. Hickman,[24] decided in the English House of Lords. The parties sought to be charged as partners were not partners *inter sese* and never intended to be, but they were entitled to share in the net income of a business as creditors until their claims were paid.

The facts were that the firm of Smith & Son, becoming financially embarrassed, turned their property over to trustees appointed by their creditors. The trustees were to carry on the business under the name of "The Stanton Iron Company," and divide the net income, *which was always to be considered the property of Smith & Son,* among the creditors until their claims were paid, and then the property was to be restored to Smith & Son. Hickman sold goods to the trustees in the name adopted by them for the business, and drew bills on them which were accepted in that name by one of the managing trustees. These bills not being paid, the action was brought to charge the creditors as partners.

[23] See Dob v. Halsey (1819), 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Bromley v. Elliot (1859), 38 N. H. 287, 75 Am. Dec. 182; Miller v. Hughes (1818), 1 A. K. Marsh. (Ky.) 181, 10 Am. Dec. 719; Simpson v. Feltz (1826), 1 McCord Ch. (S. C.) 213, 16 Am. Dec. 602; Sheridan v. Medara (1855), 2 Stockt. Ch. (N. J.) 469, 64 Am. Dec. 464; Pratt v. Langdon (1867), 97 Mass. 97, 93 Am. Dec. 61; Polk v. Buchanan (1857), 5 Sneed (Tenn.) 721, Burd. Cas. 62.

[24] Cox v. Hickman (1860), 8 House of Lords Cases 268, Mechem's Cas. 102, Ames Cas. 47, Burd. Cas. 65, Gilm. Cas. 31.

The case went through all of the courts to the House of Lords. It was urged that as they were to share the profits of a business which was being carried on under their control, the creditors thereby became liable as partners, and half of the judges were of this opinion; but the Lords united in repudiating the old and arbitrary rule, and placed the liability upon the ground which has since been maintained in England—that of mutual agency.

§ 89. Same subject.—In the leading opinion of Lord Cranworth it was said: "It was argued that as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This no doubt is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

§ 90. Same subject.—"Taking this to be the ground of liability as a partner," continued Lord Cranworth, "it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with

their debtor or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.'' The defendants were therefore held not liable.

§ 91. Effect of Cox v. Hickman on English law.—In a case arising not long afterwards it became essential to determine, in the language of Blackburn, J., ''what really was the effect of the decision of the House of Lords in Cox v. Hickman,'' and he said: ''Prior to that decision, the *dictum* of De Grey, C. J., in Grace v. Smith, 'that every man who has a share of the profits of a trade ought also to bear a share of the loss,' had been adopted as the ground of judgment in Waugh v. Carver, where it was laid down 'that he who takes a moiety of all profits indefinitely shall, by operation of law, be made liable to losses if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.' This decision has never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time; and when, more recently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. In Cox v. Hickman the creditors of a trade had agreed that their debtor's trade should be carried on for the purpose of paying them their debts out of the profits, and the composition deed to which they were parties secured to them a property in the profits. The rule laid down in Waugh v. Carver, if logically followed out, led to the conclusion that all the creditors who assented to this deed, and by so doing agreed to take the profits, were individually liable as partners; but when it was sought to apply the rule to such an

extreme case, it was questioned whether the rule itself was really established. There was a very great difference of opinion amongst the judges who decided the case in its various stages below, and also amongst those consulted in the House of Lords. In the result, the House of Lords—consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale and Chelmsford—unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the *ratio decidendi*.

"I think that the *ratio decidendi* is, that the proposition laid down in Waugh v. Carver—*viz.*, that a participation in the profits of a business does of itself, by operation of law, constitute a partnership—is not a correct statement of the law of England; but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."[25]

§ 92. Effect of Cox v. Hickman in the United States.—In the United States the case of Cox v. Hickman has been quite generally followed.[26] In many of the states earlier decisions fol-

[25] Bullen v. Sharp (1865), L. R. 1 Com. Pl. 86, Ames' Cas. 67, Burd. Cas. 71, Gilm. Cas. 36. See, also, Mollwo v. Court of Wards (1872), L. R. 4 Pr. Coun. App. 419, Ames' Cases 79; Pooley v. Driver (1876), 5 Ch. Div. 458, Ames' Cases 87. See, also, now the English Partnership Act, § 2, Appendix, *post;* Gosling v. Gaskill [1897], App. Cas. 575.

[26] See, for example, Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49; Dutcher v. Buck (1893), 96 Mich. 160, 55 N. W. 676, 20 L. R. A. 776, Mechem's Cas. 749; McDonald v. Campbell

lowing the old English cases have been overruled, though in others, and notably in New York[27] and Pennsylvania,[28] the courts have held the former rule to be too deeply rooted in their jurisprudence to be overthrown, except by legislative action.

The Uniform Partnership Act, as has been seen,[29] adopts the result of Cox v. Hickman by providing that no inference of partnership shall be drawn merely from the fact that a person receives a share of the profits of a business in payment of a debt by installments or otherwise, or in payment of wages or rent or of an annuity to the widow or representative of a deceased partner, or in payment of interest on a loan, though the amount varies with the profits, or in consideration of the sale of the good-will of a business or other property, whether the payment be made in installments or otherwise.

§ 93. Same subject—Beecher v. Bush.—In a case in Michigan[30] in which the question arose, the court, speaking through

(1905), 96 Minn. 87, 104 N. W. 760, Gilm. Cas. 81; Jackson v. Hooper (1909), 76 N. J. Eq. 185, 74 Atl. 130; Wade v. Hornaday (1914), 92 Kan. 293, 140 Pac. 870.

27 See Leggett v. Hyde (1874), 58 N. Y. 272, 17 Am. Rep. 244, Burd. Cas. 50, Gilm. Cas. 22; Hackett v. Stanley (1889), 115 N. Y. 625, 22 N. E. 745, Burd. Cas. 57, Gilm. Cas. 27.

28 See Wessels v. Weiss (1895), 166 Pa. 490, 31 Atl. 247, Burd. Cas. 55. In North Carolina, see Southern Fertilizer Co. v. Reams (1890), 105 N. C. 283, 11 S. E. 467; Cossack v. Burgwyn (1893), 112 N. C. 304, 16 S. E. 900. In Georgia, see Brandon v. Conner (1903), 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260. In Connecticut, see Parker v. Canfield (1870), 37 Conn. 250, 9 Am. Rep. 317. In Texas, see Cothran v. Marmaduke (1883), 60 Tex. 370.

29 Sec. 7, subd. 4, given in full *ante*, § 80. Compare Furnace Run Co. v. Heller (1911), 84 Ohio St. 201, 95 N. E. 771; Purvis v. Butler (1891), 87 Mich. 248, 49 N. W. 564; Webb v. Hicks (1898), 123 N. Car. 244, 31 S. E. 479, in all of which partnership liability was imposed on the creditors.

30 Beecher v. Bush (1881), 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Mechem's Cas. 118, Gilm. Cas. 49. In this case it appeared that Beecher owned a hotel. One Williams proposed to "hire the use" of it and pay Beecher therefor, from day to day, a sum "equal to one-third of the gross receipts and gross earnings." Beecher accepted and the arrangement went into effect. Williams bought goods of Bush which he did not pay for, and this action was to hold Beecher liable for them as a partner with Williams by force of the arrangement. *Held*, not liable.

Mr. Justice Cooley, after reviewing many of the decisions both prior and subsequent to Cox v. Hickman, says: "It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that, in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership where none exists, he is never to be charged as a partner, unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business."

No better statement of the modern rule has been found than this one.

§ 94. Same subject—Harvey v. Childs.—In another case [31] upon the subject which arose in Ohio it is said: "What shall

The Uniform Partnership Act adopts the result of Beecher v. Bush. Sec. 7, subd. 4. Compare Leavitt v. Windsor Land & Inv. Co. (1893), 4 C. C. A. 425, 54 Fed. 439. In this case, B owned a theatre building, which, by an instrument describing the parties thereto as "lessor" and "lessee", was "rented" to L for five years. For "rental", L agreed to pay B a fixed sum per year, an additional sum for heating and lighting, and one-half the net annual profits as "additional rent." The parties agreed to share the losses equally. L was given full management of the theatre. Upon a disagreement between the parties, B ejected L and took possession of the premises. L filed a bill in equity for restoration to possession, and it was held that there was equitable jurisdiction, the contract between the parties being in legal effect a contract of partnership.

31 Harvey v. Childs (1876), 28 Ohio St. 319, 22 Am. Rep. 387, Mechem's Cas. 129. In this case one Potter was buying hogs for shipment. He had not money enough, and tried to get Childs to supply it and take an interest in the venture,

be regarded, as to third persons, as a test of partnership between parties who did not consider themselves to be partners and who have done nothing to estop them from denying that they are such, has been much discussed by courts and elementary writers, and the problem seems to be one of difficult solution. It is needless to review here the numerous cases on the subject; a statement of results is sufficient.

"No little difficulty has been experienced in determining the meaning and limits of phrases that have been recognized as tests of a partnership in such cases, and in their application to the varying cases that arise. The effort has been to draw a distinct line between cases where one has a community of interest in the profits of a business, as distinguished from those where one is entitled to receive a sum of money out of the profits as a creditor, or a sum proportioned to a *quantum* of profits, or a share of the profits as a compensation for services or labor.

"Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another is the relation they sustain to each other, as being each principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged."

§ 95. Same subject.—"But if the relation of principal and agent be regarded as the test of a partnership and consequent

but Childs refused. It was then agreed that Childs should let Potter have money to complete his purchases, and Childs was to take possession of the hogs as security, sell them, reimburse himself and have half of the net profits; but that in any event Potter should pay back all of Childs' advances. Without the knowledge of Childs, Potter bought on his own credit a lot of hogs of Harvey, the plaintiff, but did not pay for them. These hogs formed part of the lot which Childs sold in pursuance of his arrangement with Potter. There were no profits, but a loss, and Potter made it good to Childs. Potter did not pay Harvey, and Harvey sued Childs to hold him liable as a partner with Potter in the purchase. *Held,* that he was not liable. See, also, Clifton v. Howard (1886), 89 Mo. 192, 1 S. W. 26, 58 Am. Rep. 97; Sutton v. Railway Co. (1919), 104 Kan. 282, 178 Pac. 418.

joint liability," continued the court, "the question still remains: What shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question? To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, cannot be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting, in the particular transaction, as the agent or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership, at last, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for where they sustained that relation, a joint liability may be said to have been incurred by the authority or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion."

§ 96. Same subject—Meehan v. Valentine.—The test of mutual agency has not, however, proven entirely satisfactory to all of the courts. It is said, and not without reason, that this is to invert the logical order of events and turn the result into the cause—that mutual agency is the result of partnership rather than that partnership is the result of mutual agency. Thus it is said in a leading case [32] in the supreme court of the United

[32] Meehan v. Valentine (1891), 145 U. S. 611, 12 Sup. Ct. 972, 36 L. ed. 835, Mechem's Cas. 135, Burd. Cas. 80, Gilm. Cas. 45. This was an action brought to charge the estate of one P., deceased, of which V. was executor, on the ground that P. was a partner in the firm of C. & Co. P. loaned C. & Co. $10,000 on the agreement that he was to have, in addition to the interest, one-tenth of the net profits over a given sum. The arrangement was annually renewed for four years. Six per cent. was the legal rate of interest in Maryland at the time. In one of the

States: "As has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Such a test seems to give a synonym rather than a definition; another name for the conclusion rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent."

§ 97. Same subject.—In this case the court further say: "In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in

years, he was guaranteed ten per cent. interest, or, if the profits exceeded $10,000, he was to have, in lieu of interest, ten per cent. of the profits. P. received, under this agreement, about $1,500 the first year; but afterwards, as it was difficult to determine the exact profits, it was agreed that he should have $1,000 each year on account, leaving the exact amount to be determined on the final settlement of the whole business. This arrangement was continued for four years, when C. & Co. failed, owing large amounts to the plaintiff and others. The court held that this was a loan; that P. was a creditor and not a partner, and consequently that the action could not be maintained.

As has been already seen, (*ante*, § 80), the Uniform Partnership Act (Sec. 7, subd. 4), provides that no inference of partnership shall be drawn merely from the fact that a person receives a share of the profits of a business "as interest on a loan, though the amount of payment vary with the profits of the business."

See, also, Johnson v. Carter (1903), 120 Iowa 355, 94 N. W. 850.

It is said in some of the older cases, where the amount of compensation exceeds the legal rate of interest, that it must be either partnership or usury, and that, as the courts will not hear parties assert that they intended usury, the result must be partnership. But this view no longer prevails; the rate may be usurious, with its consequent penalties, but the agreement does not, for that reason alone, create partnership. Compare Bloxham v. Pell (1775), 2 Wm. Bl. 999; Arnold v. Angell (1875), 62 N. Y. 508; Austin v. Neil (1898), 62 N. J. L. 462, 41 Atl. 834.

certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership."

§ 98. Same subject.—Notwithstanding these differences of opinion as to the test of mutual agency, it is entirely clear that the old rule that sharing profits as profits made one a partner is overthrown. It seems also to be true that the real test is that suggested by the definition given in the first section, namely, that there must be a community of interest—a co-ownership—a joining as principals, in carrying on a business for their joint profit. This community of interest as principals in the transaction necessarily excludes mere servants or agents who are to share profits by way of contingent compensation; lenders who are to share in the profits merely by way of contingent interest; landlords who are to take a share of the profits merely by way of rent; and any other class of creditors whose interest is not in the business itself, who have no common ownership of the business, its capital or its stock in trade, who do not *own* the profits, if there are any, who have no voice or part in controlling the management of the business, but who are simply entitled to be paid out of the profits, if there are any, some claim or demand which they have against the real principals in the business.[33]

[33] See, also, Parchen v. Anderson (1885), 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65; Vinson v. Beveridge (1879), 3 MacArth. (D. C.) 597, 36 Am. Rep. 113; Sodiker v. Applegate (1884), 24 W. Va. 411, 49 Am. Rep. 252, Gilm. Cas. 5; Waggoner v. First Nat. Bank (1894), 43 Neb. 84, 61 N. W. 112; Boston Smelting Co. v. Smith (1880), 13 R. I. 27, 43 Am. Rep. 3; Culley v. Edwards (1884), 44 Ark. 423, 51 Am. Rep. 614; Jeter v. Burgwyn (1893), 113 N. Car. 157, 18 S. E. 113; Shepard

As has been seen,[34] the Uniform Partnership Act is entirely in accord upon this point.[35]

It is apparent that the subdivision now under consideration is not properly to be deemed a ground for the creation of a *quasi*-partnership. It remains, therefore, to consider the other, already mentioned, namely—

2. *Of Holding Out as a Partner—Nominal Partner—Estoppel.*

§ 99. Person may become liable as a partner by holding himself out as one.—A person who is not actually a partner may render himself liable as though he were one, by so conducting himself as to reasonably induce third persons to believe that he is a partner and to act upon that belief. This rule is based upon the same principle as that which has been discovered in the law of Agency,—that a person may become liable for the acts of another who was not really his agent, if he has so conducted himself as to lead others reasonably to believe that such person was his agent. It is a case in which the principle of estoppel applies. Estoppel is that which stops, bars, or prevents. More specifically, for our purposes, it is that principle of the law which operates to prevent a man, who, by some express or implied representation, has led another reasonably and in good faith to rely upon the existence of a certain state of facts, from afterwards denying, to the prejudice of such other, that such a state of facts did exist. In the law of partnership it is commonly spoken of as a liability incurred by holding oneself out or permitting oneself to be held out as a partner.

§ 100. —— It involves some express or implied representation by the person in question that he is a partner, in reasonable and *bona fide* reliance upon which the person now seeking to hold him liable as such has extended a credit, or otherwise changed his position, in such a manner that he will now be prejudiced if the representation be denied.

v. Pratt (1876), 16 Kan. 209; Beard v. Rowland (1905), 71 Kan. 873, 81 Pac. 188; Weiland v. Sell (1910), 83 Kan. 229, 109 Pac. 771; Wade v. Hornaday (1914), 92 Kan. 293, 140 Pac. 870.

34 See *ante*, § 80.

35 Sec. 7 (4).

The representation must ordinarily be one, not of matters of law or of opinion merely, but of *fact*,—in this case, the assumed fact that the person sought to be held was a partner as he was represented to be.

The representation may be either that the person in question is a partner in an actually existing firm, or that he is a partner with one or more persons where no partnership between any of them actually exists.

§ 101. Same subject.—The Uniform Partnership Act declares the rule as follows: "When a person, by words spoken or written, or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person as giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made." [36]

§ 102. Same subject—What facts must exist?—In order to the existence of this liability, two main facts must be found:

1. The condition or thing relied upon as evidence of the holding out must have been caused either by the party to be charged as partner, in person, or by another with his knowledge and consent; [37] and

2. The party seeking to hold him liable as a partner must, in the exercise of reasonable prudence and good faith, have relied upon such condition or thing and been misled by it.[38]

[36] Sec. 16. Subd. 1.

[37] See Lott v. Young (1901) 48 C. C. A. 654, 109 Fed. 798.

[38] In Lindley on Partnership (vol. I, p. 43) it is said: "It follows * * * that a person cannot be liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered into. It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the

The condition or thing relied upon may be an act or a representation or a mere failure to act. No particular form or ceremony is necessary. The appearance or condition relied upon need not have been caused by the party in person, but may have been caused by others with his knowledge and consent. It may consist in a mere omission to act under such circumstances as to reasonably lead the person who relied to believe that the person sought to be held assented to the representation.[39]

alleged act of holding out must have been done either by him or by his consent, and secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and in the absence of the second, the person seeking to make him liable has not in any way been misled." See, also, Hahlo v. Mayer (1890), 102 Mo. 93, 13 S. W. 804, 22 Am. St. R. 753, Mechem's Cas. 179; Fletcher v. Pullen (1889), 70 Md. 205, 16 Atl. 887, 14 Am. St. R. 355, Mechem's Cas. 166, Gilm. Cas. 100; Morgan v. Farrel (1890), 58 Conn. 413, 20 Atl. 614, 18 Am. St. R. 282, Mechem's Cas. 171; Van Kleeck v. Hammell (1891), 87 Mich. 599, 49 N. W. 872, 24 Am. St. R. 182; Thompson v. First National Bank (1883), 111 U. S. 529, 4 Sup. Ct. 689, 23 L. ed. 507, Mechem's Cas. 771, Burd. Cas. 96, Gilm. Cas. 96; Lincoln v. Craig (1889), 16 R. I. 564, 18 Atl. 175; Cornhauser v. Roberts (1890), 75 Wis. 554, 44 N. W. 744; United States Wood Preserv. Co. v. Lawrence (1915), 89 Conn. 633, 95 Atl. 8.

39 Thus in Fletcher v. Pullen, *supra*, there was evidence that the defendant, to his knowledge, had been advertised in the newspapers as a partner with another person. Said the court: "Having knowledge of these advertisements, it was his duty to deny the partnership if he wished to escape liability. But what was he to do and how much? We do not say that he was under a legal obligation to publish a repudiation of the partnership in the same newspapers, or in any other, though this would seem to be a very obvious and the most efficient mode of proclaiming such denial, and the fact that he failed to do so was a circumstance to go to the jury. But we take it that the rule upon this subject stated by a very eminent jurist is reasonable and just: 'If one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled.' Parsons on Partnership, 134."

[The difficulty in Fletcher v. Pullen, is to find the connection between the acts which the plaintiff relied upon, but which the defendant did not know of, and the acts which the defendant knew of, but which the plaintiff neither knew of nor relied upon.]

On the other hand, in Munton v.

§ 103. Same subject—Who may enforce liability.—It is not necessary that the condition or appearance shall have been known to persons generally; it is enough, but also essential, that it was known to the party deceived by it.[40] The representation

Rutherford (1899), 121 Mich. 418, 80 N. W. 112, where it was contended that Mrs. Rutherford had been advertised in a newspaper as a partner with a Mr. Beckwith, and the trial court had instructed the jury that it was her duty, if not a partner, to see that this advertisement was promptly and unmistakably denied, and that failing in this she would be estopped to deny the partnership, the supreme court said: "The instruction was erroneous. Mrs. Rutherford was under no legal or moral obligation to publish a denial of this newspaper story. Any one who saw fit to deal with Mr. Beckwith, relying on this item, did so at his peril. If she had been shown the article, had assented to it, and credit had been given on the strength of such assent, the rule of estoppel would have applied. There being no evidence that she authorized or assented to it, there is no room for the application of the rule."

So where a wife's name was, without her authority, included in the list of partners on the letterheads of the firm in which her husband was a partner, and she complained to the partners about it and requested that it be discontinued and they promised her that it would be, it was held that no inference of her consent could be drawn where the partners continued the use of her name without her knowledge or consent and in violation of their promise. Rittenhouse v. Leigh (1880), 57 Miss. 697. Compare Anfenson v. Banks (1917), 180 Iowa 1066, 163 N. W. 608, L. R. A. 1918 D, 482.

Diligence in ascertaining and denying a report that one is a partner cannot be insisted upon where there is no evidence that he knew anything about such a report. Campbell v. Hastings (1874), 29 Ark. 512.

It surely cannot be true that a person is bound to heed or deny every idle and baseless statement or rumor that is circulated concerning him. The test must be whether, under all the circumstances, considering the time, place and person making the statement, the failure to deny it may fairly and reasonably be deemed to be evidence of an acquiescence in it.

40 Clearly the party cannot be held liable as a partner by estoppel except to those who knew of the holding out and relied upon it. Thompson v. First Nat. Bank (1884), 111 U. S. 529, 4 Sup. Ct. 689, 28 L. ed. 507, Mechem's Cas. 771, Burd. Cas. 96, Gilm. Cas. 96; Hahlo v. Mayer (1890), 102 Mo. 93, 13 S. W. 804, 22 Am. St. R. 753, Mechem's Cas. 179; Fletcher v. Pullen, *supra;* Webster v. Clark (1894), 34 Fla. 637, 16 So. 601, 43 Am. St. R. 217, 27 L. R. A. 126; Dubos v. Jones (1894), 34 Fla. 539, 16 So. 392; Knard v. Hill (1893), 102 Ala. 570, 15 So. 345; Wood v. Pennell

need not have been made to the particular person alone who relied upon it. It may have been made to each of a group of persons of which he was one, and he may have been the only one who acted upon it. It need not have been made directly to the person deceived: if it came to him by natural, direct and reasonably to be expected channels and he reasonably relied upon it, it is enough. It need not have been the only thing which influenced his action; it is enough if he relied upon it in his acting, even though other things may also have contributed to influence him. The person who made the representation need not, of course, have actually intended to influence any body's action; if what he did was naturally and directly calculated to influence action and in fact did so, it is enough. But the party seeking to enforce the liability must have exercised reasonable prudence, must have acted in good faith, and must have been actually deceived by the condition or appearance. If he knew, or ought to have known, the true state of facts, or if he did not rely upon the appearance or condition, or if he did not know of it at the time he acted, he has no cause of complaint.[41]

§ 104. —— In a leading case [42] it is said: "The law on this subject, well established by authority, may be stated thus: The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was, to some extent, induced by this belief. It must also appear that the holding out was by the party sought to be charged,

(1863), 51 Me. 52; Sheldon v. Bigelow (1902), 118 Iowa 586, 92 N. W. 701.

41 In Morgan v. Farrel, *supra*, the court held that the party seeking to enforce the liability must show that he exercised good faith and due diligence to know the truth; and that if such circumstances are brought to his notice as would be certain to excite inquiry in the mind of any prudent man, and the means of ascertaining the truth were readily accessible but not used, the party could not recover.

See also Anfenson v. Banks, *supra*.

42 Fletcher v. Pullen, *supra*.

or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as advertisements, shop bills, signs or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge or assent."

§ 105. Same subject—Holding out to the world.—It was at one time thought that there might be "a holding out to the world," so that any one who had given credit might recover, even though he knew nothing of the holding out at the time he extended the credit;[43] but this notion has long since been exploded.[44] An *actual* partner, like an undisclosed principal, may be held, although the person who gave the credit was ignorant of his existence; but a person who was not actually a partner can be held only by those who were in fact deceived by his appearing as a partner.

It is, of course, true that there may be such general, widespread and unqualified representation of partnership as to justify a jury in finding an *actual* partnership, against one who denies that he was a partner, and who may, in fact, never have intended to become one; but that is not the matter now under consideration.

§ 106. Same subject—Methods of holding out.—The methods by which one may be held out as a partner are, of course, too numerous for complete enumeration. Among the most common are knowingly permitting one's name to appear in the firm name, or on signs, letter-heads, advertisements, or in the list of partners, and the like, or knowingly permitting oneself to be referred to as a partner, and the like.[45]

[43] See Poillon v. Secor (1875), 61 N. Y. 456; Smith v. Hill (1872), 45 Vt. 90, 12 Am. R. 189; Rizer v. James (1881), 26 Kan. 221.

[44] See Thompson v. First Nat. Bank (1884), 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. 689, Mechem's Cas. 771, Burd. Cas. 96, Gilm. Cas. 96; Hahlo v. Mayer (1890), 102 Mo. 93, 13 S. W. 804, 22 Am. St. R. 753, Mechem's Cas. 179.

[45] See Thompson v. First Nat. Bank (1884), 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. 689, Mechem's Cas. 771, Burd. Cas. 96, Gilm. Cas. 96; Fletcher v. Pullen (1889), 70

For a known partner to retire from a firm and give no notice of that fact to those who have known of the existence of the firm, has the same effect, as will be seen hereafter.[46]

§ 107. Same subject—Evidence admissible.—The burden of proving the liability as a partner is upon him who asserts it. This proof may be made by any kind of evidence having a legitimate tendency to that end. Thus it may be established not only by direct evidence, but by the admissions, acts or declarations of the party sought to be charged known to and reasonably relied upon by the plaintiff. It cannot, however, be established by showing a general reputation that the party was a partner, unless he can be shown to be responsible for such reputation.

Whether the party charged has held himself out as a partner, or has permitted it to be done, is a question of fact ordinarily to be determined by the jury;[47] but where the facts are not disputed and only one inference can be fairly drawn from them the court will decide it.

§ 108. Same subject—The effect.—A person may thus become liable as though he were a partner by "holding out," usually in contract but also in tort where the tort is one, which, like deceit, acting upon invitation, and the like, may naturally and directly result from the holding out;[48] but he is not thereby

Md. 205, 16 Atl. 887, 14 Am. St. R. 355, Mechem's Cas. 166, Gilm. Cas. 100; Hahlo v. Mayer (1890), 102 Mo. 93, 13 S. W. 804, 22 Am. St. R. 753, Mechem's Cas. 179; *In re* Krueger (1871), 2 Low. 66, Mechem's Cas. 183; Evens & Howard Fire Brick Co. v. Hadfield (1896), 93 Wis. 665, 68 N. W. 468, Mechem's Cas. 783, Burd. Cas. 110; Thayer v. Goss (1895), 91 Wis. 90, 64 N. W. 312, Mechem's Cas. 492, Burd. Cas. 102; *In re* Fraser [1892], 2 Q. B. 633, Mechem's Cas. 781, Burd. Cas. 108.

See, also, Tanner Engine Co. v. Hall (1888), 86 Ala. 305, 5 So. 584; Speer v. Bishop (1874), 24 Ohio St. 598. Compare Ihmsen v. Lathrop (1883), 104 Pa. 365.

46 See *post*, Chap. XVI.

47 Fletcher v. Pullen (1889), 70 Md. 205, 16 Atl. 887, 14 Am. St. R. 355, Mechem's Cas. 166, Gilm. Cas. 100; Seabury v. Crowell (1890), 51 N. J. L. 103, 52 id. 413, 16 Atl. 84, 11 L. R. A. 136.

48 See Jewison v. Dieudonne (1914), 127 Minn. 163, 149 N. W. 20; Sherrod v. Langdon (1866), 21 Iowa 518, Burd. Cas. 112, but not such torts, *e. g.*, negligent injuries, and the like, which are not the result of the plaintiff's reliance upon

made a partner as to other persons than those relying upon the condition or appearance for which he is thus held responsible, nor does he acquire the rights or obligations of a partner as between himself and his alleged copartners.

Whether he is to be held liable alone or in connection with his reputed partner must depend upon the acts of both. If the person with whom he was held out as a partner was ignorant of it and did not concur in it, he could not be held liable. If, on the other hand, he concurred or co-operated in the holding out of the other, both may be held liable.[49]

It must also be borne in mind that though a partnership actually exists with certain bounds or limits, one or more partners may become liable to third persons beyond those bounds or limits, if they hold themselves out as partners in a more enlarged capacity than that fixed as between the partners themselves.

§ 109. —— The Uniform Partnership Act provides that—

"(*a*) When a partnership liability results, [that is, where he has been held out as a partner in an actually existing firm], he is liable as though he were an actual member of the partnership.

"(*b*) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately."[50]

With respect of his power to bind his reported partners, that Act provides:

"When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is

the holding out. Stables v. Eley (1825), 1 Car. & P. 614, Ames' Cas. 142, is therefore unsound, as has been often pointed out. See Smith v. Bailey [1891], 2 Q. B. 403; Shapard v. Hynes (1900), 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A. 675.

49 See Scarf v. Jardine (1882), L. R. 7 App. Cas. 345, Mechem's Cas. 484, Burd. Cas. 101.

50 Sec. 16, subd. 1.

the joint act or obligation of the person acting and the persons consenting to the representation." [51]

§ 110. —— Whether the effect of the estoppel is anything more than a means to personal liability, *e. g.*, whether the property of the ostensible partners is primarily liable to the creditors of the ostensible partnership, is a question considered in a later section.[52] It will there be seen that while some cases confine the effect to personal liability, others hold that the property is implicated also.

The effect of appearances of partnership where none exists upon the defences or set-offs which may be made in legal actions, will be considered in later sections.[53]

It must be kept in mind, however, as already stated, that estoppel is usually merely a method of imposing a liability *as though* the parties were partners: it does not make them partners in fact, or give them generally the rights of partners among themselves, or affect them generally with the disabilities under which, as actual partners, they might be placed. Thus, the mere fact that two persons, not in fact partners, so hold themselves out as partners in the brokerage business that they could be considered such by their creditors, is not a bar to an action brought by one of them only to recover commissions, merely because if they had been partners both must have joined in the action.[54]

§ 111. —— Under the national bankruptcy act, it has been said that the Act applies only to actual partnerships and not to those resting only on estoppel; certainly not, where the estoppel affects part only or affects the creditors in a different way.[55]

51 Sec. 16, subd. 2.

52 See *post*, §§ 459, 460.

53 See *post*, § 327; § 340 *et seq.;* Willey v. Bank (1904), 141 Cal. 508, 75 Pac. 106.

54 See Wheelock v. Zevitas (1918), 229 Mass. 167, 118 N. E. 279; Bishop v. Hall (1857), 9 Gray (Mass.) 430.

55 See *In re* Pinson (1910), 180 Fed. 787; *In re* Kenney (1899), 97 Fed. 554; Lott v. Young (1901), 48 C. C. A. 654, 109 Fed. 798; Buffalo Milling Co. v. Lewisburg Dairy Co. (1908), 159 Fed. 319.

CHAPTER VI

OF SOME INCIDENTS OF PARTNERSHIP—PARTNERSHIP ARTICLES, FIRM NAME, GOOD WILL, PARTNERSHIP PROPERTY.

§ 112. In general.—A partnership having been formed, a number of subjects incident to its existence become important, and though they may not all be similar in their character they may appropriately be grouped together in one chapter for consideration.

I. Of Articles of Partnership.

§ 113. Of the necessity of articles.—As has been stated, it is desirable, but not usually indispensable, to have written evidence of the agreement between the parties as to the creation, continuance, terms and conditions of their partnership. The formal written instruments prepared in such cases are spoken of as the partnership articles. As between themselves, it is, in general, possible for the parties to fix their rights, duties and liabilities, as well as the circumstances of the commencement, continuance and termination of the partnership, by their agreement; and though, in the absence of such an agreement, the law will usually determine these matters for them, it is not by any means certain that the legal conclusions will be the same that the parties

contemplated, and it is in any event desirable that the opportunity for controversy be removed by express stipulation.

§ 114. Of the scope of articles.—It is not, however, usually feasible, by even the most carefully-drawn articles, to provide beforehand for *every* possible contingency, or to define *all* the rights, duties or liabilities of the partners. Much must of necessity be understood; custom or usage may be tacitly recognized; and conduct or practice may add to or modify that which is expressed. It may thus happen that, in a given case, the body of law or rules which are to govern the relations of the partners as between themselves is to be gathered from a variety of sources. As was said in one case:[1] "The duties and obligations arising from the relation between the parties are regulated by the express contract between them so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all those duties and obligations, they are implied and enforced by the law; and it is often matter to be collected and inferred from the conduct and practice of the parties whether they have held themselves, or ought or ought not to be held, bound by the particular provisions contained in their express agreement."

In another case,[2] in which the question was whether the defendant was entitled to draw a salary in half years when there were no net profits, the court said: "This question is open to doubt if the partnership articles alone are looked at, but its determination does not depend merely upon the construction which would be given to the partnership articles, taken by themselves alone. It is a general rule for the construction of written instruments, including statutes, deeds and contracts, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with the court, and will usually be adopted by it.[3] This rule

1 Smith v. Jeyes (1841), 4 Beavan (Eng. Ch.) 505.

2 Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

3 Citing Stone v. Clark, 1 Metc. 378; Stevenson v. Erskine, 99 Mass. 367; Lovejoy v. Lovett, 124 Mass. 270, 274; Chicago v. Sheldon, 9 Wall. 50, 54.

has full force in the construction of partnership articles, and a practical construction given for several years by the partners themselves to language which would otherwise be open to doubt will usually be accepted by the court as conclusive."

§ 115. Of the construction of articles.—In endeavoring to determine what the parties intended by their express provisions, certain rules of construction have been laid down by the courts. Among these, the most important is that which gives prominence to the general purpose and object of the partnership. If certain of the provisions of the articles are capable of two constructions, one of which would promote while the other would retard or defeat that general purpose or object, the former construction is to be preferred; so if powers claimed would, by their exercise, advance the general object, their existence will be more readily inferred than if they are obstructive to it. In the same line are the other rules of construction, that a power conferred is to be deemed to have been so conferred with a view to the benefit of all concerned, and hence that an exercise of it for the benefit of one to the detriment of the others was not really intended, though the words used might, upon their face, bear such a construction; and that any provision, however worded, is, if possible, to be so construed as to prevent one partner from defrauding another in reliance upon its letter, but in violation of its spirit.[4]

§ 116. Of waiving or enlarging express provisions by conduct.—Any written stipulation, however express, is capable of being modified, superseded or abandoned by the consent of *all* of the partners; and this consent may be shown not only by express words, but by conduct or the established practice of the parties.[5] But the unanimous consent of all is necessary, for a portion cannot alter, modify or enlarge the contract of all.

In an English case[6] it was said by Lord Eldon: "In ordi-

[4] See Blissett v. Daniel (1853), 10 Hare (Eng. Ch.) 493; Pettyt v. Janeson (1819), 6 Maddock (Eng. Ch.) 146.

[5] See McCall v. Moss (1885), 112 Ill. 493.

[6] Const v. Harris (1824), 1 Tur. & Rus. 496. So in England v. Curling

nary partnerships nothing is more clear than this: that, although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept bills of exchange in his own name without the concurrence of the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect."

§ 117. Of continuing partnership under former articles.—When a partnership has existed under articles providing for a definite term, there may be an oral agreement to extend it;[7] but if, upon the expiration of that term, the partnership is continued without any new agreement, the original articles will in general continue to regulate the rights and obligations of

(1844), 8 Beavan 129, it was said by Lord Langdale: "With respect to a partnership agreement, it is to be observed that, all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business: when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners." See, also, Boardman v. Adams (1857), 5 Iowa 224, Mechem's Cas. 339; Scudder v. Ames (1886), 89 Mo. 496, 14 S. W. 525; Gammon v. Huse (1881), 100 Ill. 234; Gage v. Parmlee (1877), 87 Ill. 329; Thrall v. Seward (1865), 37 Vt. 573; Gregg v. Hord (1889), 129 Ill. 613, 22 N. E. 528; McCall v. Moss (1885), 112 Ill. 493; Thomas v. Lines (1880), 83 N. Car. 191.

Compare Eady v. Newton Coal Co. (1905), 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650.

[7] See Dickinson v. Bold (1816), 3 Desaus. Eq. (S. Car.) 501.

the partners; though the continuing partnership will usually be deemed to be at will merely and not renewed for a similar term, and therefore only such of the old articles will be deemed to be in force as are consistent with such a partnership.[8] The original articles may also survive changes in the persons comprising the firm, and be continued by their adoption by the new firm.

The Uniform Partnership Act contains similar provisions.[9] It declares, "(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

"(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is *prima facie* evidence of a continuation of the partnership."

§ 118. Of the usual clauses in partnership articles.—The subjects most commonly covered by the partnership articles are: (1) the nature, name and place of the business; (2) the com-

[8] See Metcalfe v. Bradshaw (1893), 145 Ill. 124, 33 N. E. 1116, 36 Am. St. R. 478, Mechem's Cas. 875; United States Bank v. Binney (1828), 5 Mason (U. S. C. C.) 176; Sangston v. Hack (1879), 52 Md. 173; Bradley v. Chamberlin (1844), 16 Vt. 613; Mifflin v. Smith (1827), 17 Serg. & R. (Pa.) 165; Stephens v. Orman (1862), 10 Fla. 9.

Thus, a provision for doing certain acts within a named period before the termination of the partnership, and which therefore contemplate a known date for the termination, will usually be inapplicable to the subsequent partnership at will. Neilson v. Mossend Iron Co. (1886), 11 App. Cas. 298; but a provision respecting acts to be done within a certain time after the termination of the partnership, may apply to the partnership at will as well as to the original one: Daw v. Herring [1892], 1 Ch. 284. See, also, Woods v. Lamb (1866), 35 L. J. Ch. 309; Hogg v. Hogg (1877), 35 L. T. Rep. N. S. 792.

The continuing partnership, it is said in Jurgens v. Ittmann (1895), 47 La. Ann. 367, 16 So. 952, is "one not resting on consent from day to day, and by force of such daily reiterated consent, but a *continuing partnership* subject to termination only after notice and under the rules of law relating to the dissolution of partnerships. Until formally or legally dissolved it continues as a partnership."

[9] Section 23.

mencement and duration of the partnership; (3) the capital and property of the firm and how and by whom contributed; (4) the share of each in the profits and losses; (5) the conduct and powers of the partners; and (6) the dissolution and winding up of the firm. Many other subjects are introduced in special cases. A form of articles which may prove to be suggestive is printed in an appendix.

§ 119. Of the enforcement of the provisions—Arbitration—Specific performance.—It is customary to include provisions for arbitration in case of disputes, and for fixing the value of shares by that method in case of the retirement of a partner. Provisions are also frequently inserted for making offers to buy or sell in case of dissolution; for giving indemnity against debts to the retiring partner; for taking in new partners; for permitting the representatives of a deceased partner to be admitted; for expelling a partner; and the like. Many of these provisions can have only a negative effect, for, as will be more fully seen hereafter,[10] it is well settled that agreements to become partners, agreements to continue a partnership for a definite time, agreements to submit disputed matters to arbitration, and agreements to admit new partners, will not ordinarily be specifically enforced by the courts, but the parties will be left to such remedy as they may find, if any, in an action for the breach of the agreement. The execution of formal instruments clearly provided for may sometimes be specifically enforced, including even the execution of partnership articles, where that is necessary to confer upon one party a right to which he is entitled, even though the partnership thereby created may be immediately dissolved.[11]

II. Of the Firm Name.

§ 120. Of the need of a firm name.—In the absence of a statute requiring it, a firm name is a customary but not a necessary

10 See *post*, § 222.

11 See England v. Curling (1844), 8 Beavan (Eng. Ch.) 129; Buck v. Smith (1874), 29 Mich. 166, 18 Am. Rep. 84, Mechem's Cas. 322; Somerby v. Buntin (1875), 118 Mass. 279, 19 Am. Rep. 459, Mechem's Cas. 326; Tobey v. Bristol County, 3 Story (U. S. C. Ct.) 819.

incident of a partnership. As has been seen, the partnership is not, in legal contemplation, a distinct and separate entity, but merely a collection of individuals with whom, for most purposes, the law deals as such. A firm name, therefore, is not indispensable,[12] but it is a matter of convenience in identifying and ascertaining the individuals interested; and when a firm name has been adopted, it ought regularly to be used in the partnership transactions. Nevertheless, as will be seen, the partners may acquire rights and incur liabilities even though the firm name was not used.[13]

§ 121. **What name may be adopted.**—In some states, as, for example, in New York, statutes have been enacted forbidding the use of the name of a person not actually interested in the firm, or the use of the term "& Co." unless it represents an actual partner.[14] Other statutes forbid the use of assumed or fictitious names unless some prescribed notice is given or public record is made showing who are the persons represented by the name.[15] But where no statute prevents, the partners

12 See Meriden Nat. Bank v. Gallaudet (1890), 120 N. Y. 298, 24 N. E. 994; Wright v. Hooker (1854), 10 N. Y. 51; Getchell v. Foster (1870), 106 Mass. 42; Haskins v. D'Este (1882), 133 Mass. 356, Burd. Cas. 135, Gilm. Cas. 154.

13 See *post*, § 121; § 296, *et seq.*

14 As to the use of the term "& Co.," when forbidden by statute, see Gay v. Seibold (1884), 97 N. Y. 472, 49 Am. Rep. 533; Sparrow v. Kohn (1885), 109 Pa. St. 359, 58 Am. Rep. 726; Wood v. Railroad Co. (1878), 72 N. Y. 196, 28 Am. Rep. 125; Zimmerman v. Erhard (1880), 83 N. Y. 74, 38 Am. Rep. 396; Wolfe v. Joubert (1893), 45 La. Ann. 1100, 13 So. 806, 21 L. R. A. 772; National Bank v. Cringan (1895), 91 Va. 347, 21 S. E. 820. Where no such statute exists, the use of "& Co." raises no necessary presumption that it represents a partner. Robinson v. Magarity (1862), 28 Ill. 423; Brennan v. Pardridge (1887), 67 Mich. 449, 35 N. W. 85. As to whether the firm name is such as to import a partnership or a corporation, see Birmingham Loan Co. v. First Nat. Bank (1893), 100 Ala. 249, 46 Am. St. Rep. 45; Clark v. Jones (1888), 87 Ala. 474, 6 So. 362; Seymour v. Harrow Co. (1886), 81 Ala. 250, 1 So. 45.

15 As to such statutes and their effect, see Castle v. Graham (1903), 87 N. Y. App. Div. 97, 84 N. Y. 120, aff'd 180 N. Y. 553, 73 N. E. 1120; Pendleton v. Cline (1890), 85 Cal. 142, 24 Pac. 659; Walker v. Stimmel (1906), 15 N. Dak. 484, 107 N. W. 1081; Guiterman v. Wishon (1898), 21 Mont. 458, 54 Pac. 566; Czatt v. Case (1899), 61 Ohio St.

may adopt any firm name they choose, so long as it does not interfere with the rights of others. They may thus use the name of a stranger, of a single partner or of a portion of the partners, or they may adopt a wholly fictitious name. They may have one name for one branch of their business and a different one for another branch; or one name for the business at one place and a different one for the business at another place.[16] They may also acquire a name by usage, even though they have another fixed by the agreement of the partners.

§ 122. Use of different name.—And though they may have a regular firm name, they may be bound by the use, in a single transaction, of some other name.[17] They may change or add to

392, 55 N. E. 1004; Cashin v. Pliter (1912), 168 Mich. 386, 134 N. W. 482, Ann. Cas. 1913 C, 697; Bolen v. Ligett (1916), 49 Okla. 788, 154 Pac. 547, L. R. A. 1916 D, 352; Elgin Jewelry Co. v. Wilson (1908), 42 Colo. 270, 93 Pac. 1107; Carland v. Heckler (1916), 147 C. C. A. 390, 233 Fed. 504; Missaukee Farm Co. v. Ferris (1916), 193 Mich. 286, 159 N. W. 490. For a somewhat similar statute, see National Bank v. Cringan, *supra;* Yale v. Taylor Mfg. Co. (1886), 63 Miss. 598.

16 See West v. Valley Bank (1856), 6 Ohio St. 168, Burd. Cas. 132; Messner v. Lewis (1857), 20 Tex. 221, Burd. Cas. 133.

17 An obligation under seal executed by all the members of a firm, in and for its business and for its benefit, binds the firm although the firm name is not mentioned, and although it appears upon its face to be simply the obligation of the partners contracted in their individual names. Berkshire Woolen Co. v. Juillard (1879), 75 N. Y. 535, 31 Am. Rep. 489, Mechem's Cas. 389. To same effect: Dreyfus v. Union Nat. Bank (1896), 164 Ill. 83, 45 N. E. 408, Burd. Cas. 139; Rouse v. Wallace (1897), 10 Colo. App. 93, 50 Pac. 366. A firm is bound by an acceptance in an agent's name which it has adopted as a firm name by an agreement of the partners to do business under the name of such agent, where it does not appear that the agent was doing business also on his own account; but if that fact appears, it must be shown that he accepted the bill on account of the partnership in order to bind it. Bank of Rochester v. Monteath (1845), 1 Denio (N. Y.) 402, 43 Am. Dec. 681. See, also, Le Roy v. Johnson (1829), 2 Peters (U. S.) 186; Ripley v. Colby (1851), 23 N. H. 438; Getchell v. Foster (1870), 106 Mass. 42; Uhler v. Browning (1859), 28 N. J. L. 79; Barcroft v. Haworth (1870), 29 Iowa 462. See, also, *post,* §§ 296-298.

A sealed note made to partners in their individual names may be endorsed by them in the firm name. Mick v. Howard (1848), 1 Ind. 250, Burd. Cas. 131.

The firm property may be trans-

the firm name at any time. They may acquire rights in the firm name and transfer them in the individual names of the partners, and *vice versa*. Whatever the name used, it may be shown by parol evidence who the persons were who were represented by it.

§ 123. What may be done in the firm name—Executing contracts, bonds, deeds—Actions at law.—As a general rule, all simple contracts, written or unwritten, negotiable or non-negotiable, whether creating rights or imposing obligations, may be made or taken in the firm name;[18] and, as will be seen,[19] one partner has usually implied authority to bind the firm by contracts made in the firm name for partnership purposes. But, as will also be seen,[20] one partner has ordinarily no implied authority to bind the firm by executing in the firm name bonds, deeds or other instruments under seal; and, in general, deeds of conveyance of real estate cannot, by the older authorities, at least, be made either by or to the firm in the firm name. Such conveyances will, however, usually operate to convey an equitable interest which may be enforced in a court of chancery; and where a conveyance of real estate is made to a firm in the name of the firm which contains the full name of one or more of the partners, a legal title will generally be held to vest in those partners whose names appear, and equity will charge them as trustees for all.[21] The tendency of the later cases, as will

ferred, though each partner makes a separate bill of sale of all his interest in his own name, where all these bills of sale are then delivered together to the grantee. Twin City Brief Printing Co. v. Review Pub. Co. (1918), 139 Minn. 358, 166 N. W. 413, L. R. A. 1918 D, 154.

18 A chattel mortgage may be taken in the firm name. Hendren v. Wing (1895), 60 Ark. 561, 31 S. W. 149, 46 Am. St. R. 218, Mechem's Cas. 797, Burd. Cas. 161, Gilm. Cas. 189. As to real estate mortgage, see Woodward v. McAdam (1894), 101 Cal. 438, 35 Pac. 1016, Mechem's Cas. 799, Burd. Cas. 163; Gille v. Hunt (1886), 35 Minn. 357, 29 N. W. 2, Gilm. Cas. 190.

19 See *post*, § 244.

20 See *post*, §§ 263, 264.

21 A deed to John Smith & Co. operates to vest the entire legal title in John Smith alone. Winter v. Stock (1866), 29 Cal. 407, 89 Am. Dec. 57; Moreau v. Saffarans (1856), 3 Sneed (35 Tenn.) 595, 67 Am. Dec. 582. A mortgage of real estate given to "Farnham & Lovejoy, of the county of Hennepin,

be seen, is much more liberal with respect of conveyances to the firm in the firm name.[22] The Uniform Partnership Act permits conveyances both by and to the firm in the firm name.[23]

Unless authorized by statute, actions cannot be maintained either by or against the partnership in the firm name, but must be brought in the individual names of the partners.[24]

§ 124. Of the firm name as property.—"The name by which a firm is known," says Mr. Justice Lindley,[25] "is not of itself the property of the firm, and, speaking generally, there is nothing at common law to prevent persons from carrying on business in partnership under any name they please." Notwithstanding this, however, it is clear that the firm name is a thing of value, which may be made the subject of sale or assignment. It is also a thing which the law will protect. Thus Mr. Justice Lindley continues: "One firm is not at liberty to mislead the public by using a name similar to the name of another firm so as to pass off themselves or their goods for that other or for the goods

state of Minnesota," is legally sufficient as a mortgage to S. W. Farnham and J. A. Lovejoy, shown to have been the members of a firm engaged in business in that county under that name. Menage v. Burke (1890), 43 Minn. 211, 45 N. W. 155, 19 Am. St. R. 235. See, also, Townshend v. Goodfellow (1889), 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. R. 736; Kelley v. Bourne (1887), 15 Ore. 476, 16 Pac. 40. To same effect in case of deed: Sherry v. Gilmore (1883), 58 Wis. 324, 17 N. W. 252; Cole v. Mette (1898), 65 Ark. 503, 47 S. W. 407, 67 Am. St. R. 945, Mechem's Cas. 801. Many other cases will be found cited, *post*, § 153.

22 See *post*, § 155.

23 See sec. 10.

24 Statutes in many states permit actions in the firm name under various circumstances: sometimes generally; sometimes where the partnership is non-resident; sometimes where the names of the several partners are not known. See Adams Express Co. v. State (1903), 161 Ind. 328, 67 N. E. 1033; Byers v. Schulpe (1894), 51 Ohio St. 300, 38 N. E. 117, 25 L. R. A. 649; Schweppe v. Wellauer (1890), 76 Wis. 19, 45 N. W. 17; O'Brien v. Foglesong (1883), 3 Wyo. 57, 31 Pac. 1047.

In the absence of such a statute, the action must be in the individual names of the partners. See Johnson v. First Nat. Bank (1906), 145 Ala. 378, 40 So. 78; Pollock v. Dunning (1876), 54 Ind. 115; Smith v. Canfield (1860), 8 Mich. 493; Heath v. Morgan (1895), 117 N. Car. 504, 23 S. E. 489.

25 Lindley on Partnership (Ewell's 2d Am. ed.), p. 114, 7th ed., p. 132.

of that other. Moreover, an established firm can prevent a company (corporation) from registering under the name of the firm."

But the rule that one firm may not adopt the same name as another firm is subject to the qualification that a person or a number of persons, who have not limited their right by contract, cannot be prevented from using his or their own name, even though it be that of a former firm in the same business, and even though its use may cause some incidental inconvenience or damage to the former firm,[26] provided it is done in good faith and with no attempt to mislead the public as to the identity.[27] On the other hand, it is equally well settled that one will not be permitted, merely under the pretext of using his own name, to practically and purposely appropriate the business or good-will of another.[28] Ordinary family names may not be exclusively appropriated as trade marks.[29]

§ 125. Of the right to the firm name upon dissolution.—The firm name, as has been seen, may be one of two kinds,—it may be a purely impersonal or fictitious name, like "The Chicago Hardware Co.," or it may be a personal one, made up in whole or in part of the individual names of the partners, like "Smith & Jones" or "John W. Smith & Co.," and some difference in legal consequences follows the distinction:

26 See Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Mechem's Cas. 222, Burd. Cas. 588, Gilm. Cas. 177; Russia Cement Co. v. Le Page (1888), 147 Mass. 206, 17 N. E. 304, 9 Am. St. R. 685; Meneely v. Meneely (1875), 62 N. Y. 427, 20 Am. R. 489; Rogers v. Rogers (1885), 53 Conn. 121, 55 Am. R. 78; Howe Scale Co. v. Wyckoff, Seamans & Benedict (1904), 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972.

27 Where such an attempt appears, the use may be enjoined. Bininger v. Clark (1870), 60 Barb. (N. Y.) 113.

28 See Robinson v. Storm (1899), 103 Tenn. 40, 52 S. W. 880; Stuart v. Stewart Co. (1899), 33 C. C. A. 480, 91 Fed. 243; Higgins Co. v. Higgins Soap Co. (1895), 144 N. Y. 462, 39 N. E. 490, 43 Am. St. R. 769, 27 L. R. A. 42; Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co. (1899), 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Pillsbury v. Pillsbury-Washburn Co. (1894), 12 C. C. A. 432, 64 Fed. 841; Singer Mfg. Co. v. June Mfg. Co. (1895), 163 U. S. 169, 16 S. Ct. 1002, 41 L. ed. 118.

29 See Howe Scale Co. v. Wyckoff, Seamans & Benedict (1904), 198 U. S. 118, 25 S. Ct. 609, 49 L. ed. 972.

1. Upon the dissolution of the partnership by act of parties or by mere lapse of time, neither partner buying out the other, either would have the right to go into business for himself and either one might usually adopt the old firm name if it were an impersonal one which could be used without leading the public to believe that the old firm still continued; but neither would have the right to use the old firm name including the individual name of any partner who did not continue with him where to do so would involve the latter in liability.[30] Neither would he have the right, where his former partner also continued in business, to announce himself as the *"successor to"* the old firm, though either might designate himself as *"formerly of"* the old firm; but he must do nothing to deceive the public, such as putting his own name and the "formerly of" in very small letters, and the old firm name in very large letters.[31] The Uniform Partnership Act has a provision which will be found in the notes.[32]

§ 126. —— 2. Upon the termination of a partnership by death, it has been held that the survivor has the right to continue the use of the old name, whether personal or impersonal;[33] but the true rule seems to be that the name, if impersonal and

30 Apparently in such a case not only may either one use the old name if he is the only one who continues business; but, if more than one of the former partners continue business, each may use it. Neither one has the exclusive right to appropriate that which belongs to one as much as to the other. See Burchell v. Wilde [1900], 1 Ch. 551; Townsend v. Jarman [1900], 2 Ch. 698; Dyer v. Shove (1897), 20 R. I. 259, 38 Atl. 498, Burd. Cas. 605.

31 See Hookham v. Pottage (1872), L. R. 8 Ch. App. 91; Smith v. Cooper (1877), 5 Abb. New Cas. (N. Y.) 274; Morgan v. Schuyler (1880), 79 N. Y. 490, 35 Am. Rep. 543; Peterson v. Humphrey (1857), 4 Abb. Pr. (N. Y.) 394; Holbrook v. Nesbitt (1895), 163 Mass. 120, 39 N. E. 794.

32 Sec. 38, (2) (b) "When dissolution is caused in contravention of the partnership agreement * * * the partners who have not caused the dissolution wrongfully, if they desire to continue in the same name, either by themselves alone or jointly with others, may do so during the agreed term for the partnership," upon giving a bond of indemnity, etc.

33 See Lewis v. Langdon (1835), 7 Simons (Eng. Ch.) 421.

of value, is a partnership asset, and must be dealt with as such,[34] subject, of course, to the right of the surviving partner to start a new business in his own name.

3. If one partner buys out the other for the purpose of continuing the business, but nothing is expressly agreed upon in reference to the name, the sale by one of all his interest in the business, and *a fortiori* if the good-will be expressly included, gives to the continuing partner the exclusive right to continue the use of the old firm name if it be a fictitious one, but not if it be a purely personal one containing the name of the retiring partner, except to the extent that the personal name has been made a trade name or a trade-mark of the business.[35] The retiring partner in such a case may go into business in his own name, but he must not use even his own name in such a manner as to mislead the public into believing that he is the old firm.[36]

[34] See Fenn v. Bolles (1858), 7 Abb. Pr. (N. Y.) 202.

Under a statute providing for the recording of firm names and disclosing who are the partners under a given name, a surviving partner runs no risk of liability where a purchaser of the old firm name continues the business in that name, even though it includes the name of the surviving partner. Slater v. Slater (1903), 175 N. Y. 143, 67 N. E. 224, 96 Am. St. R. 605, 61 L. R. A. 796, Mechem's Cas. 857. Otherwise that risk might make improper a sale of a personal firm name whose use might involve him. The heirs or the estate of the deceased partner on the other hand, cannot ordinarily be made liable merely by the continuance of the business in the old name, even though it includes the name of the deceased partner. The constructive notice of the death prevents that. See Webster v. Webster (1791), 3 Swanst. 492, 36 Eng. Reprint 949; Price v. Mathews (1859), 14 La. Ann. 11; Maryland Nat. Bank v. Hollingsworth (1904), 135 N. Car. 556, 47 S. E. 618; Uniform Partnership Act, Sec. 41, subd. 10.

[35] See Thynne v. Shove (1890), 45 Ch. Div. 577; Levy v. Walker (1879), 10 Ch. Div. 436.

[36] See Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Mechem's Cas. 222, Burd. Cas. 588, Gilm. Cas. 177; Vonderbank v. Schmidt (1892), 44 La. Ann. 264, 10 So. 616, 32 Am. St. R. 336, 15 L. R. A. 462 and note; Brass and Iron Works Co. v. Payne (1893), 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; Myers v. Kalamazoo Buggy Co. (1884), 54 Mich. 215, 19 N. W. 961, 20 id. 545, 52 Am. Rep. 811; Snyder Manufacturing Co. v. Snyder (1896), 54 Ohio St. 86, 43 N. E. 325, Mechem's Cas. 240; Rowell v. Rowell (1904), 122 Wis. 1, 99 N. W. 473. As to the use of individual names as trademarks, see Fish Bros. Wagon Co. v. Fish (1892), 82 Wis. 546, 52 N. W. 545,

4. The retiring partner may, however, by express agreement invest the continuing partner with the right to continue the former firm name, even though it is a purely personal one; and the retiring partner may, in the same manner, limit his own right to resume business or to use or permit to be used his own name in connection with a new business to compete with the old.[37]

5. Where the firm business and good-will are sold to a third person,—whether voluntarily or as the result of some legal proceeding—, the purchaser will, in the case of manufacturing and trading partnerships at least, acquire the right to such use of impersonal firm names as can be made without involving the former partners in personal liability for the debts of the new business.[38] There is less risk of such a liability where the sale is made on legal process involving publicity of the fact than where it is the result of private negotiation. The effect of the sale of the good-will upon the right to use the name is considered more fully in a later section.[39]

III. OF THE GOOD-WILL.

§ 127. What is meant by the good-will.—What is known as the "good-will" of the business may properly be considered

33 Am. St. R. 72, 16 L. R. A. 453; Marshall v. Pinkham (1881), 52 Wis. 585, 9 N. W. 615, 38 Am. Rep. 756; Russia Cement Co. v. Le Page (1888), 147 Mass. 206, 17 N. E. 304, 9 Am. St. R. 685; Shaver v. Shaver (1880), 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. 188.

"The defendant is not deprived of the right to use his own name in connection with conduct of his business simply from the fact that his surname is a portion of the trademark used by the copartnership of which he was formerly a member, and whose business has been continued by plaintiff." White v. Trowbridge (1906), 216 Pa. 11, 64 Atl. 862.

37 See Grow v. Seligman (1882), 47 Mich. 607, 41 Am. Rep. 737; Frazer v. Frazer Lubricator Co. (1887), 121 Ill. 147, 13 N. E. 639, 2 Am. St. R. 73; Symonds v. Jones (1890), 82 Me. 302, 19 Atl. 820, 17 Am. St. R. 485, 8 L. R. A. 570; Le Page Co. v. Russia Cement Co. (1892), 51 Fed. 941, 17 L. R. A. 354, 5 U. S. App. 112.

38 See Snyder Mfg. Co. v. Snyder (1896), 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657, Mechem's Cas. 240; Twin City Brief Printing Co. v. Review Pub. Co. (1918), 139 Minn. 358, 166 N. W. 413, L. R. A. 1918 D, 154.

39 See *post*, § 130.

in connection with the name. The good-will is regarded as a valuable incident of the business, and may be sold or transferred as such. Precisely what it is the courts have found it difficult to define. "The term good-will," says Mr. Justice Lindley,[40] "can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it." Mr. Justice Story[41] describes it as the benefit or advantage "which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Lord Eldon[42] declared that "the good-will of a trade is nothing more than the probability that the old customers will resort to the old place;" and this is approved by Mr. Parsons,[43] who says: "It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded upon a probability."

The term "good-will," however, as is pointed out in a case[44] in Nebraska, is often used in three different senses: 1. That

[40] 1 Lindley on Partnership (Ewell's 2d Am. ed.), 439.

[41] Story on Partnership, § 99.

[42] In Cruttwell v. Lye (1810), 17 Ves. 335, 346. Many later cases, however, regard this definition as too narrow. See Trego v. Hunt [1896], App. Cas. 7, Mechem's Cas. 247, Burd. Cas. 602.

See, also, Macfadden v. Jenkins (1918), — N. Dak. —, 169 N. W. 151; French v. Parker (1888), 16 R. I. 219, 14 Atl. 870, 27 Am. St. R. 733; Cowan v. Fairbrother (1896), 118 N. Car. 406, 24 S. E. 212, 54 Am. St. R. 733, 32 L. R. A. 829; Bloom v. Ins. Agency (1909), 91 Ark. 367, 121 S. W. 293; Maxwell v. Sherman (1911), 172 Ala. 626, 55 So. 520.

[43] Parsons on Partnership (4th ed.), § 181.

[44] Lobeck v. Hardware Co. (1893), 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795.

above indicated; 2. Where it is connected with or includes a trade-mark or trade-name;[45] and 3. Where it is coupled with an express agreement not to compete with the business with which it is connected. The first is the true use, and it is in that sense that the term is here used.

The real and substantial essence of good-will—the thing which leads people to buy it and pay money for it—is the hope or expectation that the buyer will thereby acquire an established business or source of business instead of being compelled to devote time and money to developing a business *de novo.*

§ 128. Good-will as an asset.—The good-will is a partnership asset. As a rule, it inheres in the business and not in the locality, though in the case of hotels, theaters and similar places the rule may be otherwise.[46] It does not attach to the stock in trade, and does not necessarily pass with a sale of the stock. It does pass, however, with a sale of the business, or of all interest in or assets of the business.[47]

[45] As an illustration of this form, the court cited Smith v. Walker (1885), 57 Mich. 456, 22 N. W. 267, 24 id. 830, 26 id. 783. See, also, as to the effect of the sale of business and good-will where the firm name has been made a trade-mark, Horton Mfg. Co. v. Horton Mfg. Co. (1883), 18 Fed. 816; Snyder Mfg. Co. v. Snyder (1896), 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657, Mechem's Cas. 240. In the former case the court said: "If one has made of his own name a trade-mark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred."

[46] See as to good will relating to hotels, theaters, stores, etc.: Chittenden v. Witbeck (1883), 50 Mich. 401, 15 N. W. 526; Booth v. Jarrett (1876), 52 How. Pr. (N. Y.) 169; Woodward v. Lazar (1863), 21 Cal. 448, 82 Am. Dec. 75; Armstrong v. Kleinhaus (1884), 82 Ky. 303, 56 Am. Rep. 894; Vonderbank v. Schmidt (1892), 44 La. Ann. 264, 10 So. 616, 32 Am. St. R. 336, 15 L. R. A. 462. Dental office: Slack v. Suddoth (1899), 102 Tenn. 375, 52 S. W. 180, 73 Am. St. R. 881, 45 L. R. A. 589; Morgan v. Schuyler (1880), 79 N. Y. 491, 35 Am. Rep. 543. Newspaper: Metropolitan Bank v. St. Louis Dispatch Co. (1892), 149 U. S. 436, 13 S. Ct. 944, 37 L. ed. 799.

[47] Hoxie v. Chaney (1887), 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Merry v. Hoopes (1888), 111 N. Y. 415, 18 N. E. 714; Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161. Mechem's Cas. 222, Burd. Cas. 588.

§ 129. Disposition of good-will on dissolution.—Upon the dissolution of the partnership, the good-will of a manufacturing or trading partnership at least,[48] is a firm asset and must be sold for the benefit of the partners, if either partner desires such sale.[49] If no effort is made to bring about such a sale, the good-will as a firm asset will usually lapse. Either partner may start in business again (in the absence of any agreement to the contrary), and get such incidental benefit from his former connection with the partnership business as he is able.[50] Upon a termination by death, the good-will does not go to the survivor alone, but is still a firm asset which he must deal with like other assets,[51] and for whose value he must account if he appropriates it to himself.[52]

§ 130. Effect of sale—Right to use firm name.—The sale of the good-will by one partner to another does not, *of itself*, carry

48 See Read v. Mackay (1905), 47 N. Y. Misc. 435; Masters v. Brooks (1909), 132 N. Y. App. Div. 874, 117 N. Y. Supp. 585. In Slack v. Suddoth, *supra*, it is said that there can be no forced sale of such good will as is "based upon professional reputation and standing such as arises from the skill of physicians, dentists, attorneys, etc., whatever may be done as to such good will as arises out of location."

See, also, Macfadden v. Jenkins (1918), — N. Dak. —, 169 N. W. 151.

49 See Sheppard v. Boggs (1879), 9 Neb. 257; Snyder Mfg. Co. v. Snyder (1896), 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657, Mechem's Cas. 240.

50 See Rice v. Angell (1889), 73 Tex. 350, 11 S. W. 338; Slack v. Suddoth, *supra*.

51 See Hutchinson v. Nay (1903), 183 Mass. 355, 67 N. E. 601, Mechem's Cas. 838; Hutchinson v. Nay (1905), 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. R. 390, Mechem's Cas. 842; Tennant v. Dunlop (1899), 97 Va. 234, 33 S. E. 620. Compare Didlake v. Grocery Co. (1909), 160 Ala. 484, 49 So. 384, 22 L. R. A. (N. S.) 907; Musselman's Appeal (1869), 62 Pa. St. 81, 1 Am. Rep. 382; Dyer v. Shove (1897), 20 R. I. 259, 38 Atl. 498, Burd. Cas. 605.

52 See Smith v. Everett (1859), 27 Beav. (Eng. Ch.) 446; Hill v. Fearis [1905], 1 Ch. 466; Rammelsberg v. Mitchell (1876), 29 Ohio St. 22; Rowell v. Rowell (1904), 122 Wis. 1, 99 N. W. 473; Hutchins v. Page (1910), 204 Mass. 284, 90 N. E. 565, 134 Am. St. R. 656; Frear v. Lewis (1915), 166 N. Y. App. Div. 210, 151 N. Y. S. 486; Costa v. Costa (1915), 222 Mass. 280, 110 N. E. 309; Moore v. Rawson (1905), 185 Mass. 264, 70 N. E. 64, Mechem's Cas. 1089; s. c., 199 Mass. 493, 85 N. E. 586.

the right to the firm name, if it be a personal one including the name of the retiring partner in such a form that its continued use would subject him to liability for the debts of the new business. Unless more was stipulated for, his name could only be used to the extent that it had become or been made a trade-name or trade-mark.[53] The buyer's right to use impersonal names would usually be conceded. The same consequences would also ordinarily follow where the sale was by the firm or its representative to a third person,[54] that is to say, impersonal names, in the case of manufacturing and trading partnerships at least, and trade-names would pass, but not personal ones or those based upon personal qualities or attributes, such as those of professional or, it is said, private banking partnerships.[55]

[53] See Knoedler v. Glaenzer (1893), 55 Fed. 895, 5 C. C. A. 305, 14 U. S. App. 336, 20 L. R. A. 733; Vonderbank v. Schmidt (1892), 44 La. Ann. 264, 10 So. 616, 32 Am. St. R. 336, 15 L. R. A. 462; Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Mechem's Cas. 222, Burd. Cas. 588, Gilm. Cas. 177.

[54] See *ante*, § 125.

[55] In Read v. Mackay (1905), 47 N. Y. Misc. 435, 95 N. Y. Supp. 935, it is said: "From what has been said it follows that while a firm name may in some cases be deemed a part of the good will of business, it is not of itself, and necessarily, a part of the good will, and that, while in trade it may under some circumstances be such, it can not become a part of the good will in cases of business which depend upon the personal attributes of the partners engaged therein, such as professional partnerships. In such cases it has been ruled that the good will of business does not include the firm name (Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543), and that the court will not order a compulsory sale. Slack v. Suddoth, 102 Tenn. 375, 52 S. W. 180, 45 L. R. A. 589, 73 Am. St. R. 881. It is quite clear, therefore, that the firm name, while in every case a valuable adjunct to the good will, is not necessarily a part of the good will, simply by reason of the fact that it is an established firm name, and in my opinion there is no basis for a distinction between a partnership name of a banking business and a professional partnership for the purposes of the present question. Each is equally distinguishable from a manufacturing or trading partnership, so far as the inclusion or exclusion of the firm name in or from the good will is made to depend upon the personal qualities of the members of the firm. The banker, as such, while, of course, essential to trade and a means of it, is not a trader or tradesman."

See, also, Masters v. Brooks (1909), 132 N. Y. App. Div. 874, 117 N. Y. Supp. 585.

§ 131. Limitations resulting from sale of good-will upon right to carry on competing business.—What limitations, if any, a mere sale of the good-will, without any restrictive covenants, will impose upon the seller with reference to his right to subsequently carry on a competing business, is a matter not everywhere agreed upon. The rule might conceivably be that no limitation would be implied; or that there should be a complete disability; or, adopting a middle view, that it might be done under some circumstances or by certain methods but not otherwise. A distinction may also be made depending upon whether the sale of the good-will is voluntary or forced. The English courts have drawn the line in the case of a voluntary sale at personal solicitation of former customers. The voluntary seller of the good-will may embark in a similar business, in the same town—next door, if he will—: he may advertise publicly as any one else might do who was starting a new business, but he may not endeavor to get back the trade of the old customers—which is what he has sold—by taking advantage of his knowledge of who they are to personally and privately solicit them to continue to deal with him.[56] If they come to him as the result of the same sort of public advertising which a new dealer would resort to, he is not obliged to refuse to deal with them. Any other new dealer might properly have reached them in the same way. This seems to be the rule sustained by the weight of authority.[57] The Massachusetts court, on the other hand, has held that one who has made a voluntary sale of the good-will may not start the new business at such a time or place as will substantially result in his encroachment upon the business he has sold. He may not derogate from his own grant.[58] Some other

[56] See Trego v. Hunt [1896], App. Cas. 7, Mechem's Cas. 247, Burd. Cas. 602.

[57] See Ranft v. Reimers (1902), 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291, Mechem's Cas. 852; Williams v. Farrand (1891), 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161, Mechem's Cas. 222, Burd. Cas. 588; Von Bremen v. MacMonnies (1910), 200 N. Y. 41, 93 N. E. 186, 32 L. R. A. (N. S.) 293; Wentzel v. Barbin (1899), 189 Pa. 502, 42 Atl. 44; Zanturjian v. Boornazian (1903), 25 R. I. 151, 55 Atl. 199. *Contra:* Cottrell v. Babcock Printing Press Co. (1886), 54 Conn. 122, 6 Atl. 791.

[58] See Angier v. Webber (1867), 14 Allen (96 Mass.) 211, 92 Am. Dec. 748; Dwight v. Hamilton (1873), 113 Mass. 175; Munsey v. Butterfield (1882), 133 Mass. 492;

courts have taken the same view; and some have made distinctions in this respect between professional, and mercantile or trading, partnerships.[59]

§ 132. —— Where the sale of good-will is not a voluntary one but is forced by legal process or the necessity of winding up, as, for example, a sale by an assignee in bankruptcy, a receiver, a surviving partner, or the partners themselves at the ordinary termination of the partnership, a different rule applies. England permits personal solicitation where the sale was forced,[60] and the Massachusetts rule permits him to start a new business though it may incidentally encroach upon the business sold.[61]

IV. Of the Capital of the Firm.

§ 133. **What constitutes capital.**—The capital of the firm, strictly speaking, is the aggregate of the sums which the partners have agreed to contribute for the transaction of the partnership business. It differs from the property of the firm, inasmuch as the capital is a fixed sum, while the amount of property possessed by the firm may vary from time to time, and be more or less than the capital. It differs also from advances made by the partners to the firm, for the latter are ordinarily in the nature of loans to the firm, and not contributions to its fixed capital.[62]

In a loose or popular sense, the term capital is often used to indicate the aggregate of property or assets which the firm

Foss v. Roby (1907), 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200, 11 Ann. Cas. 571; Old Corner Bookstore v. Upham (1907), 194 Mass. 101, 80 N. E. 228, 120 Am. St. R. 532; Gordon v. Knott (1908), 199 Mass. 173, 85 N. E. 184, 19 L. R. A. (N. S.) 762. Compare Bassett v. Percival (1862), 5 Allen (87 Mass.) 345.

59 See Brown v. Benzinger (1912), 118 Md. 29, 84 Atl. 79, Ann. Cas. 1914 B, 582.

60 See Walker v. Mottram (1881), 19 Ch. Div. 355; Trego v. Hunt, *supra*.

61 See Hutchinson v. Nay (187 Mass. 262), *supra;* Batchelder & Co. v. Batchelder (1914), 220 Mass. 42, 107 N. E. 455; Von Bremen v. MacMonnies, *supra*.

62 1 Lindley on Partnership (Ewell's 2d ed.), 320.

may have, in the same way that we sometimes speak of the capital of a single individual.

Undivided profits which are allowed to accumulate do not thereby become capital, though they are, of course, part of the firm assets.[63] Some agreement on the part of the persons interested to capitalize them, would be necessary in order to have that effect.

§ 134. Fixing amount and interests.—In the final distribution of assets upon the winding up of the partnership business, capital is usually to be distributed among the partners in proportion to the capital contributed, and it is therefore desirable to have the amount of the capital and the shares of each partner definitely fixed, though, where nothing appears to the contrary, it will be presumed that their shares are equal.

The amount of the capital as originally determined cannot subsequently be increased or diminished without the consent of all of the partners.[64]

§ 135. Certificates or other evidence of interest.—It is not the common practice, in ordinary partnerships, to issue certificates of "stock" or other similar evidence of a partner's interest; though there is no legal objection to it and it is occasionally done.[65] Such interests are, of course, in their nature not transferable like shares of stock in a corporation. In the case of the large partnerships with transferable shares, usually called joint-stock companies, such certificates of ownership are more common.

63 See Dean v. Dean (1882), 54 Wis. 23, 11 N. W. 239, Gilm. Cas. 164.

The partnership agreement may, of course, provide that undivided profits shall, or may at the option of the partner, become part of the capital. Molineaux v. Raynolds (1896), 54 N. J. Eq. 559, 35 Atl. 536, Gilm. Cas. 215.

64 Natusch v. Irving (1824), Gow on Partn. 398.

65 See e. g. Harper v. Raymond (1858), 3 Bosw. (16 N. Y. Super.) 29, 7 Abbott Pr. 142.

In Power Grocery Co. v. Hinton (1920), — Ky. —, 218 S. W. 1013, certificates of stock issued by a corporation to which the partnership succeeded were, by agreement, treated and transferred as certificates of interest in the partnership.

§ 136. What may be received as contributions to capital.—The contributions to the capital need not be in money, but may be made in real or personal property, labor, skill, or whatever the parties may agree to receive as such. Neither is it necessary that each partner shall contribute the same kind of thing, for one may contribute money and another property and another skill, and the like. The *use* only of property may also be contributed, the partner retaining to himself as an individual the title to it.[66] It is not necessary that the several contributions shall be equal in amount or value; for one may contribute much while another contributes little.[67]

It does not follow, however, where one contributes money, and the other skill, experience or labor, that upon a termination of the partnership they will share it in common; for, as will be seen, upon such a termination each partner is to be repaid his contributions to capital before the profits are divided.[68]

§ 137. Enforcing contribution of capital.—The firm not being generally regarded as a legal entity, separate and distinct from the partners, no action at law can be maintained by the firm to compel a partner to pay in his agreed contribution to capital.

[66] See Heran v. Hall (1840), 1 B. Mon. (Ky.) 159, 35 Am. Dec. 178; Meadows v. Mocquot (1901), 110 Ky. 220, 61 S. W. 28, 22 Ky. L. R. 1646; Nichols v. Murphy (1891), 136 Ill. 380, 26 N. E. 509; Humes v. Higman (1906), 145 Ala. 215, 40 So. 128; Gordon v. Gordon (1882), 49 Mich. 501, 13 N. W. 834; Davis v. Davis [1894], 1 Ch. 393; Murphy v. Warren (1885), 55 Neb. 215, 75 N. W. 573; Stumph v. Bauer (1881), 76 Ind. 157, Gilm. Cas. 175.

[67] Where the contract contemplates equal contributions to capital, to be made in instalments as the business may require, and one partner in fact has chief charge of the business which proves to be very profitable, he will not be permitted, by making further contributions without calling upon his copartner for equal ones or giving him an opportunity to make them, to swell his own share of the capital and profits at the expense of his copartner. The court will permit the other partner to fill up his capital and share in the profits accordingly. Fulmer's Appeal (1879), 90 Pa. St. 143.

[68] See Shea v. Donahue (1885), 15 Lea (Tenn.) 160, 54 Am. Rep. 407, Mechem's Cas. 692, Gilm. Cas. 168; Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311, Mechem's Cas. 695, Burd. Cas. 575, Gilm. 488; Hayes v. Hayes (1889), 66 N. H. 134, 19 Atl. 571. Compare Meadows v. Mocquot, *supra*.

Such an action would require the partner in question to be at the same time one of the plaintiffs as well as the defendant.[69] Where, however, one person agrees with another to become a partner and contribute a certain amount of capital, and then refuses to perform the contract, the other may maintain an action at law against him to recover damages for the breach of the agreement.[70]

Payment of promised contributions to capital could, indeed, be enforced for the benefit of creditors, as in the case of subscriptions to the capital of a corporation, but since normally each partner is individually liable to creditors for all of the partnership debts, there would ordinarily be no reason for their attempt to enforce a more limited liability. In adjusting the relations of the partners among themselves, however, such agreements would be important.

V. Of the Property of the Firm.

1. *Of Firm Property in General.*

§ 138. What may be partnership property.—The property of the firm may be that originally contributed by the partners to form the partnership capital, or it may be that subsequently acquired in partnership dealings. It may be either real or personal. Unless provided otherwise by the articles or by statute, there is no limit to the kind or amount of the property which the firm may possess.

Somewhat different rules apply when the property is real estate, and these will be made the subject of separate mention.

§ 139. What constitutes partnership property.—What property is partnership property, or when it becomes such, is not always easy to determine. "Not only all the goods and merchandise properly so called," says Mr. Parsons,[71] "but all chattels bought by the partnership, or otherwise coming to them,

[69] See *post*, § 201, *et seq.*

[70] See Hill v. Palmer (1882), 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703, Mechem's Cas. 303; Treat v. Hiles (1887), 68 Wis. 344, 32 N. W. 517, 60 Am. R. 858; Bagley v. Smith (1853), 10 N. Y. 489, 19 How. Prac. 1, 61 Am. Dec. 756.

[71] Parsons on Partnership, § 177.

as their furniture, books, etc., are partnership property; and so also all bills of exchange and notes, or other evidence of debts, and all debts or accounts or balances, or other claims; and all shares in companies, or scrip bought with partnership funds, or otherwise assigned to the partnership and not transferred to the individual partners and charged in their accounts, would be regarded as partnership property."

The Uniform Partnership Act in general terms declares:

"(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

"(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property." [72]

§ 140. Same subject—Property bought by partner in his own name.—Whether property bought by one partner in his own name is partnership property depends upon the circumstances and the intention. One partner may, of course, buy property for himself; but where he takes title in his own name to property bought with partnership funds, there is a strong presumption that it is partnership property, though he may show that, by arrangement with his partners, it was really to be his own; as, for example, that the funds were loaned to him with which to buy the property on his own account. If, however, he takes title in himself when it was his duty to take it for the firm, the other partners may require him to secure to them their interests in it; and, though he buys in his own name, if he was really buying for the firm, the firm is liable to the seller. It is simply the application of the rules of agency, the partners collectively being the principal, and the partner the agent.[73]

[72] Sec. 8.

[73] See Traphagen v. Burt (1876), 67 N. Y. 30; Davis v. Davis (1882), 60 Miss. 615; Kruschke v. Stefan (1892), 83 Wis. 373, 53 N. W. 679.

Where two partners in the grocery business contributed outside funds to buy railroad stock but took a certificate in the firm name, but it was not a partnership transaction, the stock is not partnership property: Morse v. Pacific Ry. Co. (1901), 191 Ill. 356, 61 N. E. 104.

§ 141. Same subject—Property used by the firm.—Not all property used by the firm is firm property; for, as has been seen, the partners' contribution to the firm capital may be simply the use of property and not its title; and, during the continuance of the relation, the firm may acquire, by lease or otherwise, the right to use or employ the individual property of a partner as well as of a stranger.

Where persons, who were not then partners and were not acting for the firm either actually or potentially, buy property in their own names, on their own account, and with their own funds, the mere fact that they afterward become partners and use the property in their partnership business is not enough to convert it into partnership property.[74] Some actual conveyance, or some enforceable agreement to convey or to hold in trust, is requisite.

§ 142. Partner's "lien" on property.—In considering the question of the partnership property, regard must be had to what is usually called the lien of the partners thereon. As will be seen in a later chapter,[75] there is deemed to arise from the very fact of the partnership, where nothing to the contrary is agreed upon, a very important right in each partner which materially affects the nature and extent of each partner's interest in the partnership property. Lord Lindley in his book on Partnership has stated it as follows: "In order to discharge himself from the liabilities to which a person may be subject as a partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his co-partners, as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership prop-

74 See Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. 1078, 46 Am. St. R. 883, 27 L. R. A. 449, Mechem's Cas. 195, Burd. Cas. 165, Gilm. Cas. 171; Grant v. Bannister (1911), 160 Cal. 774, 118 Pac. 253; Taber-Prang Art Co. v. Durant (1905), 189 Mass. 173, 75 N. E. 221

75 Post, Ch. XIX.

erty for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them, as partners, to the firm."

Translating this into terms of tenancy in common, it might be said of two equal partners that each was the owner of an undivided one-half of all the partnership property subject to a lien thereon in favor of his co-partner to secure the application of the property to partnership purposes. Reciprocally, the partner whose share was thus subject to this lien would have a similar lien for a similar purpose on his co-partner's share. So long as this lien continued any sale or transfer of a partner's interest must usually and necessarily be made subject to it.

Notwithstanding this use of the word lien, however, the actual situation, as will be seen, cannot adequately be expressed in mere terms of lien.

§ 143. Nature of each partner's interest in the firm property.—In the absence of any special agreement prescribing a different rule, *all* the members of the firm are interested in the *whole* of the partnership property. They are, however, strictly speaking, neither mere joint tenants nor mere tenants in common though they are often spoken of as such, and though their relation has some of the characteristics of each of those tenancies. It has a form of survivorship, but, unlike ordinary joint tenancies, the surviving partner has not a complete beneficial ownership. It is somewhat like tenancy in common, but, unlike that relation, one partner has no such freedom in transfering his interest and putting the transferee into his place, that a tenant in common has. The rights of the firm creditors, and the right of each partner, often called a lien, to have firm property used to pay firm debts, materially affect the nature of each partner's interest in the firm property. The result is that the partners hold by a peculiar tenure, and are the possessors of a peculiar interest. That interest—regarded as transferable property rather than a mere right to share in current profits and participate in the conduct of the business, and assuming the part-

ners' liens to be still in force—is simply each partner's *share* in whatever surplus may remain after the debts and obligations of the firm are paid.[76] It is a right, not to partition or distribution of the property in kind, but to have the assets sold and the proceeds divided after the payment of partnership debts and obligations. The partners may, indeed, by agreement, divide the surplus of the property after the payment of the debts, in kind, if they see fit to do so, but neither can claim such a division as a matter of right; and if the estate is settled in court the property will be sold and the surplus divided in money.[77] The rule is the same whether the property is real or personal.

§ 144. —— Although the interest of each partner in the partnership property cannot be completely assimilated to that of a joint tenant or tenant in common, many courts have been slow to recognize that fact, or to realize that a distinct form of tenure, namely, a tenancy in partnership had in reality been developed. Some courts, however, have recognized it,[78] and the Uniform Partnership Act frankly declares that "A partner is co-owner with his partners of specific property holding as a tenant in partnership." [79]

It also declares that "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." [80]

§ 145. Extent of each partner's interest.—This share or interest of each partner is obviously made up of two kinds of items: 1. That, if anything, which is due to be returned to him

[76] See Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. 59, 31 Am. St. R. 353, Mechem's Cas. 194; Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 567, Ames' Cas. 229, Burd. Cas. 222, Gilm. Cas. 251; Staats v. Bristow (1878), 73 N. Y. 264, Mechem's Cas. 192, Gilm. Cas. 211; Nichol v. Stewart (1880), 36 Ark. 612.

[77] Wild v. Milne (1859), 26 Beavan, 504, Ames' Cas. 173, Burd. Cas. 166.

Under Uniform Partnership Act, sec. 38, each partner has a right to distribution "in cash."

[78] See Preston v. Fitch (1893), 137 N. Y. 41, 33 N. E. 77; Murrell v. Mandlebaum (1892), 85 Tex. 22, 19 S. W. 880, 34 Am. St. R. 777.

[79] Sec. 25.

[80] Sec. 26.

on account of his advances and his contributions to capital.[81] 2. That, if anything, which is due to him on account of profits.[82] No final distribution of profits, of course, can take place until the contributions to capital have been restored or provided for. The ratio of distribution of the two funds—capital and profits—*may* be the same, but it is not *necessarily* so. It will be the same where the parties have agreed that profits or losses are to be divided in the same proportions as the contributions to capital; but, where nothing is shown respecting such an agreement, it will be presumed that the profits and losses are to be shared equally. This will be the presumption even though it appears that the contributions to capital were unequal.[83] Speaking of shares in this sense, that is, of shares in the profits and losses as distinct from contributions to capital, Mr. Justice Lindley says: "Whether partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection or character, whether they have or have not labored equally for the benefit of the firm, their shares will be considered as equal unless some agreement to the contrary can be shown to have been entered into."[84]

§ 146. The transfer of shares.—Such being the nature ascribed to a partner's share or interest, it is clear that he has no individual title to any specific article or portion of the part-

81 See *post*, § 468.

82 See *post*, §§ 466-468.

83 1 Lindley on Partnership (Ewell's 2d Am. ed.) 348, 349; Robinson v. Anderson (1855), 20 Bevan, 98; Peacock v. Peacock (1809), 16 Ves. 49; Taft v. Schwamb (1875), 80 Ill. 289; Ligare v. Peacock (1884), 109 Ill. 94; Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311; Mechem's Cas. 692, Burd. Cas. 575; Woelfel v. Thompson (1899), 173 Mass. 301, 53 N. E. 819; Huger v. Cunningham (1906), 126 Ga. 684, 56 S. E. 64; Frazer v. Linton (1897), 183 Pa. 186, 38 Atl. 589.

An occasional statement to the contrary is found in the cases, especially where one definite sum of money as capital is contrasted with another, as in Pirtle v. Penn (1835), 3 Dana (Ky.) 247, 28 Am. Dec. 70, Mechem's Cas. 313. See also *per* Hoffman, J., in Hasbrouck v. Childs (1858), 3 Bosw. 16 N. Y. Super. 105; Raymond v. Putnam (1862), 44 N. H. 160, Gilmore's Cas. 490, was a case where the parties had expressly *agreed* to share profits and losses equally although their contributions to capital were unequal.

84 1 Lindley on Partnership (Ewell's 2d Am. ed.) 349.

nership property, and hence can neither assign, sell nor mortgage any particular portion of it as his own. The utmost that he alone can do is to transfer his share or interest in the whole assets, subject to the other partner's lien, and the value of such share or interest can only be conclusively determined upon an accounting of the partnership affairs.[85] Of this nature only, therefore, is the right which is transferred by a partner's sale or assignment of his interest, or which passes to his representative upon his death, or which can be reached by his separate creditor,[86] or which can be claimed by the legatee under his will, or which devolves upon his assignee in bankruptcy or insolvency.

The Uniform Partnership Act denies the right of a partner alone to assign his interest in specific partnership property.[87]

A partner may, indeed, transfer such interest as he has,[88] and

[85] Collins' Appeal (1883), 107 Pa. 590, 52 Am. Rep. 479; Whigham's Appeal (1869), 63 Pa. 194; Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. 59, 31 Am. St. R. 353, Mechem's Cas. 194, Burd. Cas. 304; Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 567, Ames Cas. 239, Burd. Cas. 222, Gilm. Cas. 251; Sloan v. Wilson (1897), 117 Ala. 583, 23 So. 145; Pratt v. McGuinness (1899), 173 Mass. 170, 53 N. E. 380, Gilm. Cas. 212; McKee v. Covalt (1905), 71 Kan. 772, 81 Pac. 475, Gilm. Cas. 213.

[86] See following section; Walter v. Herman (1901), 110 Ky. 800, 62 S. W. 857, Gilm. Cas. 575.

Successive seizures of all partners' shares—Theoretically and by the weight of authority the partnership title would not be divested, even though the share of every partner were seized or acquired by his separate creditor. See Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 567, Ames' Cas. 229, Burd. Cas. 222, Gilm. Cas. 251; Johnson v. Shirley (1898), 152 Ind. 453, 53 N. E. 459; Osborn v. McBride (1876), 3 Sawy. (U. S. C. C.) 590.

Contra: See Doner v. Stauffer (1829), 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370, Ames' Cas. 302, Burd. Cas. 218, Gilm. Cas. 247; Stahl v. Osmers (1897), 31 Oreg. 199, 49 Pac. 958, Mechem's Cas. 579, Burd. Cas. 237.

[87] "A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property." Sec. 25, subd. 2(*b*).

[88] See Patterson v. Atkinson (1897), 20 R. I. 102, 37 Atl. 532, Burd. Cas. 241; State Bank v. Kelley (1896), 47 Neb. 678, 66 N. W. 619, Burd. Cas. 243.

this limited interest will often be held to pass under a conveyance by which he has attempted to transfer a greater right.[89]

§ 147. —— The transfer of his interest, however, does not operate to introduce the grantee into the firm, but, if complete and final, it is ordinarily said to dissolve the partnership,[90] leaving to the grantee the right to the value of the share acquired as determined by the final accounting.

An exception to this rule of dissolution exists in joint-stock companies, mining partnerships, and others in which, by statute or agreement, the shares of the members are transferable.

The Uniform Partnership Act declares that an assignment by a partner of his interest in the partnership does not *per se* dissolve the partnership, or, as against the other partners in the absence of agreement, entitle the assignee to interfere in management or administration, or to require information or inspect the books, but merely gives him the right to receive the assigning partner's share of the profits. If dissolution does ensue, the assignee may then receive his assignor's share, and may require an account since the date of the last accounting agreed to by all of the partners.[91]

§ 148. Seizure of partner's share by his individual creditor.— Notwithstanding this rather intangible nature ascribed to the partner's interest in the partnership property, it is in most States still regarded by the law courts as so far tangible that it may be seized and sold upon a common law writ of execution at the suit of his individual creditor,[92]—a thing not permitted,

89 See Carrie v. Cloverdale Co. (1891), 90 Cal. 84, 27 Pa. 58.

90 See *post*, §§ 363, 364.

91 Sec. 27, Appendix.

92 See, in general, Newhall v. Buckingham (1853), 14 Ill. 405, Mechem's Cas. 788; Hershfield v. Claflin (1881), 25 Kan. 166, 37 Am. Rep. 237, Mechem's Cas. 792; Johnson v. Wingfield (1897), 42 S. W. 203 (Tenn. Ch.), Gilm. Cas. 515, Burd. Cas. 406; Williams v. Lewis (1888), 115 Ind. 45, 17 N. E. 262, 7 Am. St. R. 403; Nixon v. Nash (1861), 12 Ohio St. 647, 80 Am. Dec. 390; Morrison v. Blodgett (1836), 8 N. H. 238, 29 Am. Dec. 653; Hutchinson v. Dubois (1881), 45 Mich. 143, 7 N. W. 714; Whigham's Appeal (1869), 63 Pa. St. 194; Moody v. Payne (1817), 2 Johns. Ch. (N. Y) 548, Ames' Cas. 296; Johnson v. Evans (1844), 7 Man. & G. 240, Ames' Cas. 286;

in the absence of a statute, in the somewhat similar case of the interest of a corporator in a corporation. Though the right to do so in some way is thus generally recognized, the greatest conflict exists as to the method of making the right available, while complete uncertainty usually exists as to the extent and value of the interest so seized and offered for sale. In a few States, the levy is only upon the general *interest* of the partner, and tangible property is not disturbed.[93] In a few States, the creditor may levy upon and sell the partner's interest in specific items of partnership property;[94] but usually where any actual seizure is permitted, while the creditor may seize the whole property for the sake of reaching the partner's interest therein, he may not levy upon and sell specific portions of the property.[95] In view of the uncertainty of the interest sold, and

Filley v. Phelps (1847), 18 Conn. 294.

In a few States the creditor, having made a levy, may have the aid of equity to ascertain the extent of the interest. See Place v. Sweetzer (1847), 16 Ohio 142, Gilm. Cas. 511.

One partner may buy his copartner's interest at such a sale: Baird v. Baird (1837), 21 N. Car. (1 Dev. & Bat. Eq.) 524, 31 Am. Dec. 399; but not if there was any unfairness: Perens v. Johnson (1857), 3 Smale & Gif. 419.

Of course, a levy upon the partnership property to reach a single partner's interest must give way before a later levy at the suit of a partnership creditor if there is not enough for both, Eighth Nat. Bank v. Fitch (1872), 49 N. Y. 539, Burd. Cas. 403; Walter v. Herman (1901), 110 Ky. 800, 62 S. W. 857, Gilm. Cas. 575; although, as will be seen, *post*, § 463, a prior levy by a partnership creditor upon individual property does not give way to a later levy by an individual creditor: See Meech v. Allen (1858), 17 N. Y. 300, 72 Am. Dec. 465, Mechem's Cas. 677, Ames' Cas. 326, Gilm. Cas. 499; *In re* Sandusky (1878), 17 Nat. Bank. Reg. 452, Burd. Cas. 421.

93 See Hutchinson v. Dubois, *supra;* Blumenfeld v. Seward (1893), 71 Miss. 342, 14 So. 442 (by statute); Sanborn v. Royce (1882), 132 Mass. 594, Gilm. Cas. 510; Daniel v. Owens (1881), 70 Ala. 297; Richard v. Allen (1887), 117 Pa. 199, 11 Atl. 552, 2 Am. St. R. 652.

It will be observed that if the partner's interest was merely that of a cotenant subject to a lien, the property could be seized, subject to that lien.

94 See Fogg v. Lawry (1878), 68 Me. 78, 28 Am. Rep. 19; Randall v. Johnson (1881), 13 R. I. 338, Gilm. Cas. 508; Trafford v. Hubbard (1886), 15 R. I. 326, 4 Atl. 762, 8 Atl. 690; Johnson v. Wingfield, *supra;* Hershfield v. Claflin, *supra* (dictum).

95 See Gerard v. Bates (1888), 124

the hardship to the other partners which must inevitably result from seizing the firm property in order to reach an interest which may ultimately prove of little value to the purchaser, it is a case pre-eminently calling for legislation providing a more appropriate method,[96] and a few States have statutes regulating it.[97]

§ 149. —— The Uniform Partnership Act provides that a partner's interest in specific partnership property is not subject to attachment or execution, except on a claim against the partnership,[98] but it provides that a judgment creditor of a partner may have an order of court charging the partner's interest with the payment of the judgment and that a receiver

Ill. 150, 16 N. E. 258, 7 Am. St. R. 350; Branch v. Wiseman (1875), 51 Ind. 1.

[96] See the remarks, on this subject, in Sanborn v. Royce, *supra*.

[97] Thus, for example, see Iowa Code, 1897, § 3977; Aultman v. Fuller (1880), 53 Iowa 60, 4 N. W. 809, Gilm. Cas. 526

In Kentucky, see Holmes v. Miller (1897), 41 S. W. 432, 19 Ky. L. R. 660, Burd. Cas. 417.

In Georgia, by special statute (Code, 1911, § 3190), the partner's interest may be reached by garnishment of the partnership. See Willis v. Henderson (1871), 43 Ga. 325, Ames' Cas. 311, Burd. Cas. 418.

The individual creditor of one partner cannot reach his interest by garnishment of the partnership, under the ordinary statute.

Neither can such a creditor reach by garnishment the interest of one partner in the debts due to the partnership. Peoples Bank v. Shryock (1877), 48 Md. 427, 30 Am. Rep. 476, Gilm. Cas. 513; Johnson v. King (1845), 6 Humph. (Tenn.) 233, Ames' Cas. 306; Hoaglin v. Henderson (1903), 119 Iowa 720, 94 N. W. 247, 97 Am. St. R. 335, 61 L. R. A. 756.

The partnership cannot be subjected to bankruptcy procedure on the bankruptcy of one partner only. Sec. 5*h*. Same rule ordinarily applies under State insolvency proceedings. See Dearborn v. Keith (1849), 5 Cush. (Mass.) 224; Hanson v. Paige (1855), 3 Gray (Mass.) 239.

An action in equity, *e. g.*, a creditor's bill would not ordinarily be an appropriate method of reaching one partner's interest in the partnership as there is this legal remedy; but where it was alleged that there was collusion between the debtor and his partner to transfer and cover up his interest a creditor's bill to set aside the transfer and subject the interest to the claim of the creditor was sustained. Henderson v. Farley Nat. Bank (1898), 123 Ala. 547, 26 So. 226, 82 Am. St. R. 140.

[98] See Sec. 25, Subd. C, Appendix.

of such interest may be appointed through whom the order may be made effectual.[99]

That Act also provides that "the interest charged may be redeemed at any time before foreclosure, or, in case of a sale being directed by the court, may be purchased without thereby causing a dissolution:

(*a*) With separate property, by any one or more of the partners, or

(*b*) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold."[1]

It is obvious that these provisions raise some new and interesting questions, not yet settled by the authorities.

2. *Of the Title to Personal Property.*

§ 150. May be held in firm name.—As has been already stated, the title to personal property may be acquired, held and disposed of by the partnership in the firm name, whether the name be a personal or a purely artificial one, and this is the proper and appropriate manner in which the title to such property should be taken, held and transferred. Bills of sale and chattel mortgages may therefore be made to or by the partnership in the firm name,[2] subject to the disabilities, hereafter to be noticed, attaching to the execution of instruments under seal. Choses in action, as well as choses in possession, may be acquired or transferred in the name of the firm

§ 151. May be held in the name of one partner for the firm.—But personal property may be partnership property although the title is taken or held in the name of one partner only. It may have been so taken and held with the consent of all of the

99 Sec. 28, Appendix. Compare Brown v. Hutchinson [1895], 2 Q. B. 126, Burd. Cas. 419 under English Act.

1 Sec. 28 (2), Appendix.

2 Henderson v. Gates (1889), 52 Ark. 371, 12 S. W. 780; Hendren v. Wing (1895), 60 Ark. 561, 31 S. W. 149, 46 Am. St. R. 218, Mechem's Cas. 797, Burd. Cas. 161; Chicago Lumber Co. v. Ashworth (1881), 26 Kan. 212; Kellogg v. Olsen (1885), 34 Minn. 103, 24 N. W. 364.

partners, in which case their rights to it, as between themselves, are clear; but it may also have been so taken or held by one partner in violation of his duty to the firm, but in this case also, as has been seen, equity regards it as partnership property and will protect the rights of the other partners in it.

§ 152. Title is in partners collectively.—Whether, however, the title taken be in the firm name or in that of one partner for the firm, the beneficial ownership of the property is not in the partners as so many separate individuals, but in the partners collectively and as such. The partners are, as has been seen, neither mere joint tenants nor tenants in common, but tenants in partnership, while each partner is merely the possessor of that peculiar interest already described, known as the partner's share. One partner, therefore, as has been already noted, acting merely in his individual capacity, can, while the partnership purposes remain unsatisfied, neither sell, assign nor mortgage any specific chattel, but simply all or part of his residuary interest in the whole assets.[3]

It will be observed that the authority of one partner to sell partnership property, as a partnership act, is not here in question.

3. *Of the Title to Real Estate.*

§ 153. Older rule—Legal title to real property cannot ordinarily be taken in firm name.—Partnership real estate stands upon peculiar footing. It was the common law conception that title to real estate could vest only in some *person*, either natural or artificial (like a corporation), which could be identified by a particular name. A partnership was not a *person*, but merely a group of individuals, each having his individual name. The group or partnership, not being a distinct legal person, could have no distinctive group name. While, therefore, a partnership might have the beneficial ownership of land or might deal in land, it could not take title to land by a conveyance to it merely in the firm name. An attempted conveyance to the firm

[3] See *ante*, §§ 146, 147.

by the firm name would therefore usually be a nullity as a conveyance (though it might often operate as a contract to convey).[4] This was especially true where the firm name was a purely artificial one; though where the firm name contained the individual name of one or more of the partners the courts were quite ready to seize upon that fact in order to save the conveyance, and would hold that the legal title vested in the partner or partners whose names so appeared, and such partner or partners would then hold the legal title in trust for the firm.[5]

[4] Compare Tidd v. Rines (1879), 26 Minn. 201, where a deed to "Todd, Gorton & Co." was held to convey no legal title, with Byam v. Bickford (1885), 140 Mass. 31, 2 N. E. 687, which went to the other extreme and held a deed to "South Chelmsford Hall Association," an unincorporated association, was sufficient to vest legal title in the members as tenants in common. See also Percifull v. Platt (1880), 36 Ark. 456; Burns v. McCabe (1872), 72 Pa. 309; Silverman v. Kristufek (1896), 162 Ill. 222, 44 N. E. 430 (where it is said that "a deed to 'Nevins, Townsend & Co.' passes nothing at law"); Spaulding Mfg. Co. v. Godbold (1909), 92 Ark. 63, 121 S. W. 1063, 135 Am. St. R. 168, 19 Ann. Cas. 947, 29 L. R. A. (N. S.) 282 (where conveyance to "Spaulding Manufacturing Co." was said not to be good at law but good in equity). In Trexlar v. Africa (1910), 42 Pa. Super. 542, a conveyance to "American Stave & Lumber Co." which was contended to be the name, not of a firm, but of a single individual, was held not good.

[5] See *ante*, §123, and note.

See Percifull v. Platt, *supra*, (where it was said that a deed to "George F. Lovejoy & Co." would pass the legal title to Lovejoy); Moreau v. Saffarans (1856), 3 Sneed (35 Tenn.) 595, 67 Am. Dec. 582 (where the same holding was made under a deed running to "John L. Saffarans & Co."); Winter v. Stock (1866), 29 Cal. 407, 89 Am. Dec. 57 (to same effect); Arthur v. Weston (1856), 22 Mo. 378 (deed to "W. W. Phelps & Co." vests title in Phelps only); Beaman v. Whitney (1841), 20 Me. 413 (where it was said that a deed to "Whitney, Watson & Co." would vest title in Whitney and Watson at least); Holmes v. Jarrett (1872), 7 Heisk. (Tenn.) 506 (to same effect); Sherry v. Gilmore (1883), 58 Wis. 324, 17 N. W. 252 (tax deed to "Gilmore & Ware" not void); Cole v. Mette (1898), 65 Ark. 503, 47 S. W. 407, 67 Am. St. R. 945, Mechem's Cas. 801 (deed to Mette & Kanne, good); LaFayette Land Co. v. Caswell (1910), 59 Fla. 544, 52 So. 140, 138 Am. St. R. 166 (same); Dwyer Pine Land Co. v. Whiteman (1904), 92 Minn. 55, 99 N. W. 362 (same).

Compare Dunlap v. Green (1894), 60 Fed. 242, 8 C. C. A. 600.

§ 154. —— But the equitable title is in the firm.—But though, according to the earlier view, the firm as such cannot, in the firm name, hold the legal title to real estate, the equitable title to firm realty is in the firm, and equity will ordinarily regard and protect the land as partnership property. For this purpose, the person or persons holding the legal title, whether one partner or all, will be regarded as holding in trust for the firm.[6]

As will be seen in a later section, however, this will not be true as against *bona fide* purchasers for value who, without notice of the trust, have purchased from the record owner of the legal title; and in a few States, notably in Pennsylvania,[7] the rights of creditors of the one appearing upon the public records as the owner will not be subordinated to the rights of firm creditors.

§ 155. Modern rule more liberal—Uniform Partnership Act. —Since names are in any case only labels by which to identify the persons whom they represent, and since, even in the case of natural persons, the name may not always sufficiently identify the person and parol evidence is necessary to complete the identification—as where a deed of land is made in the name of a grantee whose name is the same as that of other persons in the same community—it would be only the application of the same theory—perhaps slightly extended—to hold that a deed of lands might be made to a partnership in the firm name, and that parol evidence might be resorted to, when necessary, to identify the persons represented by the name and in whom the title would

6 See Riddle v. Whitehill (1889), 135 U. S. 621, 10 Sup. Ct. 924, 34 L. ed. 282; Paige v. Paige (1887), 71 Iowa, 318, 32 N. W. 360, 60 Am. R. 799; Harris v. Harris (1891), 153 Mass. 439, 26 N. E. 1117; Hatchett v. Blanton (1882), 72 Ala. 423; Shanks v. Klein (1881), 104 U. S. 18, Mechem's Cas. 211, Gilm. Cas. 269.

In Paige v. Paige, *supra*, it is held that the title may be held in trust for the firm although the legal title is vested in *all* of the partners in the same manner and proportion as though they were tenants in common.

7 See Kepler v. Erie Dime Savings Co. (1882), 101 Pa. 602. See, also, in Maryland, National Union Bank vs. National Mechanics' Bank (1894), 80 Md. 371, 30 Atl. 913, 45 Am. St. R. 350, 27 L. R. A. 476, Mechem's Cas. 204.

vest. This is, of course, constantly done already in the case of ordinary partnership contracts, bills, notes, warehouse receipts, bills of lading, and the like. As has already been stated, this doctrine has also been applied in the case not only of chattel mortgages [8] but of mortgages upon land as well.[9] There is also a growing body of authority that it may be done in the case of deeds of land to a partnership by the firm name; and it is believed that no court, not constrained by its own earlier decisions, would now hold such a deed to be void as a conveyance even though the name did not contain the personal name of any one of the partners.[10]

The Uniform Partnership Act adopts this view fully, and provides that "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name." [11] Further, "A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears." [12]

8 See Hendren v. Wing (1895), 60 Ark. 561, 31 S. W. 149, 46 Am. St. R. 218, Mechem's Cas. 797, Burd. Cas. 161.

9 See Menage v. Burke (1890), 43 Minn. 211, 45 N. W. 155, 19 Am. St. R. 235; Woodward v. McAdam (1894), 101 Cal. 438, 35 Pac. 1016, Mechem's Cas. 799, Burd. Cas. 163; Morse v. Carpenter (1847), 19 Vt. 613.

10 See Byam v. Bickford (1885), 140 Mass. 31, 2 N. E. 687 (deed to unincorporated association by artificial name good); same, *arguendo*. Kelley v. Bourne (1887), 15 Oreg. 476, 16 Pac. 40; Maugham v. Sharpe (1864), 17 Com. Bench (N. S.) 443, Burd Cas. 160.

In Wray v. Wray [1905], 2 Ch. 349, following Maugham v. Sharp, a deed to "William Wray" which was the firm name of four partners, was held to vest title in the partners.

More numerous are the cases in which the firm name included some of the individual names of the partners. See Walker v. Miller (1905), 139 N. Car. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 4 Ann. Cas. 601, 111 Am. St. R. 805 (where all of the partners whose names appeared in the firm name were dead but the family continued the business); Murray v. Blackledge (1874), 71 N. Car. 492; Blanchard v. Floyd (1890), 93 Ala. 53, 9 So. 418; Kentucky Block Coal Co. v. Sewell (1918), — C. C. A. —, 249 Fed. 840.

11 Sec. 8(3).

12 Sec. 8(4).

§ 156. When land is partnership property.—Granting that the form of the conveyance is such that the land might be partnership property, the question whether land actually held in the name of one partner or of all is partnership property or not, where there is no unequivocal evidence of the intention, is one of much importance and frequently of great difficulty. The question may be raised either by the partners themselves, or by the heirs or widow of a deceased partner, or by the separate creditors of the partner in whose name the legal title may be vested, claiming priority over the firm creditors.

In dealing with this question a number of considerations are important, but perhaps the most important initial consideration is the inquiry whether the land was acquired *before* or *after* the formation of the partnership.

§ 157. Same subject—Land acquired during the partnership. —If the land was acquired *after* the formation of the partnership the question of whose funds were used in its purchase will become material. If the land was bought with the private and not partnership funds of the partners, this would ordinarily seem to suggest that the land was to be the private and not partnership property of the partners,[13] unless there was something to indicate that the amount of the purchase money was to be regarded as a loan or advance by the partners to the firm,[14] or that its capital was to be thereby increased, or the scope of its business extended, and the like. A purchase on individual account would be consistent with an intention or agreement to thereafter sell or lease the land to the partnership or to permit it to use the land upon terms which had been or might be mutually agreed upon.

If the land was purchased with partnership funds, this would ordinarily seem to point to ownership by the firm; [15] but it might

[13] See Wilhite v. Boulware (1889), 88 Ky. 169, 11 Ky. L. R. 59, 10 S. W. 629.

[14] See Jones v. Beckman (1900), 47 Atl. 71 (N. J.).

[15] This is commonly put upon the ground that where one man pays for land but the legal title is taken in the name of another, a trust will ordinarily arise in behalf of him who paid the price.

This rule has in some States been changed by statute, *e. g.* in Michigan; nevertheless substantially sim-

nevertheless appear that firm funds had been appropriated to individual uses with intent to make a purchase or investment on individual account.[16] Such an appropriation of firm funds might be in a sense wrongful, as where it depleted the fund to which firm creditors had a right to look for the satisfaction of their claims; or it might be entirely unobjectionable, as where the firm had undivided profits to which the partners were then entitled and which by agreement they distributed in this way without the formality of first paying them over to the several partners who would then use them to make an individual purchase.[17]

The form and purport of the conveyance may throw some light upon the question. Does the deed state whether the land is to be firm or individual property? Are the proportions in which the title vests the same as or different from those which the ratio of the partners' interests would suggest for a partnership purpose? and the like.

§ 158. —— The chief criterion by which the question is to be determined, it was declared in a leading case, is the intention of the partners. "That intention," said the court,[18] "may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed, the circumstances usually relied upon to determine the question are the ownership

ilar results are there arrived at. See Way v. Stebbins (1882), 47 Mich. 296, 11 N. W. 166.

It need not actually be used in the firm's business to be firm property when bought with firm funds. It may be a firm investment: Foster v. Sargent (1903), 72 N. H. 170, 55 Atl. 423.

The Uniform Partnership Act provides that "unless the contrary intention appears, property acquired with partnership funds is partnership property." Sec. 8(2).

16 See Frey v. Eisenhardt (1898), 116 Mich. 160, 74 N. W. 501 (where money was withdrawn from a solvent firm to buy each of the two partners a home); Chandler v. Jessup (1892), 132 Ind. 351, 31 N. E. 1109 (where money was withdrawn from the firm's assets by mutual consent to make individual purchase); City of Providence v. Bullock (1884), 14 R. I. 353 (where land, though purchased with partnership funds, was treated and carried as individual property).

17 See cases cited in preceding note.

18 Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. 1078, 46 Am. St. R. 883, 27 L. R. A. 449, Mechem's Cas. 195, Burd. Cas. 165.

of the funds paid for the land, the uses to which it is put, and the manner in which it is entered upon the books of the firm.[19] Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and, in such case, it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them, or in a stranger.[20] If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application."[21]

§ 159. —— For the purposes of the present question, land purchased upon partnership *credit* would be deemed to be purchased with partnership funds; and money paid on account of

[19] Citing here, 1 Bates on Partnership, § 280; 2 Lindley on Partnership, marg. p. 649; 17 Am. & Eng. Ency. of Law, 945. In Lindsay v. Race (1894), 103 Mich. 28, 61 N. W. 271, it is said: "Whether lands held in the name of one partner or of both are to be deemed copartnership property is generally a question of intent, to be gathered from the manner in which the members of the firm have dealt with them. While the fact that the funds of the copartnership have been used in paying for the lands, when originally purchased or subsequently, is not conclusive of this intent, yet it is persuasive evidence, and when, as in this case, it is accompanied by the entry of the transaction on the firm books as a copartnership transaction, under circumstances which import a daily declaration that it was so regarded, it is convincing."

[20] Citing here, Parsons on Partnership (4th ed.), § 265; 1 Bates on Partn., § 281; Johnson v. Clark (1877), 18 Kan. 157. To same effect: Page v. Thomas (1885), 43 Ohio St. 38, 1 N. E. 79, 54 Am. R. 788; Collner v. Greig (1890), 137 Pa. 606, 20 Atl. 938, 21 Am. St. R. 899; Pepper v. Thomas (1887), 85 Ky. 539, 4 S. W. 297, 9 Ky. L. R. 122; Ross v. Henderson (1877), 77 N. C. 170; Roberts v. Eldred (1887), 73 Cal. 394, 15 Pac. 16.

[21] Citing here, Parker v. Bowles, 57 N. H. 491; Bates on Partn., *supra.* To same effect: Riddle v. Whitehill (1889), 135 U. S. 621, 10 Sup. Ct. 924, 34 L. ed. 282; Way v. Stebbins (1882), 47 Mich. 296, 11 N. W. 166; Paige v. Paige (1887), 71 Iowa 318, 32 N. W. 360, 60 Am. R. 799, Mechem's Cas. 217; Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. R. 867, Burd. Cas. 257.

the firm, as a loan or advancement to it, or as an increase of its capital, would be deemed partnership funds, although for convenience sake it was paid directly for the land and was not passed through the partnership treasury.

So, also, land acquired by part or all of the partners before the partnership was actually organized but practically contemporaneously and in contemplation of it, and for firm purposes, may be found to be a firm purchase and to constitute firm property, though the title was taken in individual names and paid for with individual funds, if those funds were really contributions to firm capital or assets and were paid directly to the seller of the land instead of being first turned into firm funds and then used in the purchase.[22]

§ 160. Same subject—Land acquired prior to the partnership.—Where the land was purchased or acquired in their individual capacity by persons who thereafter became partners or some of them, the question whether it has been converted into partnership land is one of greater difficulty, and the authorities cannot be reconciled. In the case[23] quoted from in the preceding section it is said: "The theory of some of the cases is that real estate bought with separate, and not partnership, funds cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands unless by writing, in view of the statute of frauds, except such as results by implication of law.[24] There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some in-

[22] This is well illustrated in Bopp v. Fox (1872), 63 Ill. 540; Ames v. Ames (1888), 37 Fed. 30.

See, also, Collins v. Decker (1879), 70 Me. 23.

[23] Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. 1078, 46 Am. St. R. 883, 27 L. R. A. 449, Mechem's Cas. 195, Burd. Cas. 165, Gilm. Cas. 171.

[24] Citing here, Parker v. Bowles (1876), 57 N. H. 491.

stances the land is held to be the property of the partners, and the improvements to be the property of the firm.[25]

"The use of the property is not conclusive of its character as real estate or personalty, but is only evidence of the intention of the parties. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation.[26] And where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit." [27]

§ 161. —— The difficulty which arises here is, of course, one chiefly resulting from the requirements of the statute of frauds. The title, by the hypothesis, being in the individuals or some of them, and having been so acquired before the partnership began, it can only be vested in the firm by either (1) some actual conveyance, or (2) by some agreement to convey or hold in trust which is capable of being specifically enforced. Under this second head the statute of frauds must either be complied with or avoided in some way. In order to comply with the statute, there must be either a written contract or declaration of trust,

[25] Citing 1 Bates on Partnership, §§ 281, 282, 285. See also, Deveney v. Mahoney (1872), 23 N. J. Eq. 247.

[26] Citing Parsons on Partnership, § 267.

[27] Citing 17 Am. & Eng. Ency. of Law, 954.

In National Union Bank v. National Mechanics' Bank (1895), 80 Md. 371, 30 Atl. 913, 27 L. R. A. 449, 45 Am. St. R. 350, Mechem's Cas. 204, it is said that where the land was originally owned by the partners as individuals, and so stands upon the public records, something more than the mere intent of the partners or the entries upon their own books is necessary to convert the property into firm property as against individual creditors. Compare Goldthwaite v. Janney (1894), 102 Ala. 431, 15 So. 560, 28 L. R. A. 16, Mechem's Cas. 804, Burd. Cas. 176; Alkire v. Kahle (1888), 123 Ill. 496, 17 N. E. 693, 5 Am. St. R. 540.

In Goepper v. Kinsinger (1883), 39 Ohio St. 429, the land was bought and improved by a father. Later he formed a partnership with his sons and they carried on business on this property. There was no evidence of any agreement, contract or conveyance to make the property firm property. *Held* that it remained individual property.

or an oral contract or declaration of which some note or memorandum in writing, signed by the parties to be charged, can be produced. In order to avoid the effect of the statute, there must be such part performance of an oral contract to convey to the partnership as will enable a court of equity to decree specific performance even though there be no note or memorandum. If the title is in part of those only who subsequently become the partners, there must of course be found some valid conveyance, agreement to convey or declaration of trust in favor of all, in order to make the land firm property. If the title is in all of those who subsequently become the partners, still, since the rights of partners are different from those of mere tenants in common, there must here also be some agreement or situation of trust which equity can enforce.

Since, by the hypothesis, there was no partnership and hence no partnership funds in existence at the time the title was acquired, there can here be no such resulting or constructive trust, arising from the payment of firm funds, as is referred to in the preceding sections.

The agreement which equity may enforce in these cases need not be express or formal; quite informal agreements or understandings, if sufficiently established, have often sufficed.[28]

The note or memorandum which will satisfy the statute of frauds may often be found in entries or memoranda in the partnership books, if they are sufficiently signed, etc.,[29] while the part performance which may save the contract may often be found in the fact that the firm has taken possession and made valuable improvements upon the land.[30] Where the title is in

[28] See Johnson v. Hogan (1909), 158 Mich. 635, 123 N. W. 891, 37 L. R. A. (N. S.) 889.

[29] Thus in National Union Bank v. National Mechanics Bank (*supra*) the court said that if the property in dispute had been so used as to indicate a purpose to put it into the business as capital and had been "*entered on the books of the firm in such a way as to comply with the statute of frauds,*" then the firm creditors might be given priority over the separate creditors.

[30] See Roberts v. McCarty (1857), 9 Ind. 16, 68 Am. Dec. 604.

On the other hand, the improvements may have been made merely as compensation for the use of the land—which was to remain individual property, or with the intention that the firm would acquire an

all of those who become the partners, something persuasive of a change from their prior relation of tenants in common (who are possessing and improving their own property as such) to that of partners is essential.[31] As pointed out in the preceding sections, mere use of the property by the firm is not enough, since that is quite as consistent with a tenancy or license as with a partnership tenure.

As is also pointed out in a previous section, the purchase of land, although made before the firm was actually organized, may be so practically contemporaneous with it, and in contemplation of it, as to be fairly regarded, so far as the present questions are concerned, as a purchase made during the partnership and with its funds.[32]

§ 162. Nature of partner's interest in partnership realty.— The interest of each partner in the partnership real estate,— not now speaking merely of the legal title and how it may be held—like his interest in the partnership personal property, is not a title to any specific parcel or to any specific portion, but simply an interest in the residue after the partnership debts have been paid and its affairs are wound up.[33] Until that purpose is accomplished, therefore, he can sell, assign or mortgage no greater interest in his own right, nor can more be taken upon process against him at the suit of his individual creditors.

interest in the improvements only. See Frink v. Branch (1844), 16 Conn. 260.

31 Thus in Taber-Prang Art Co. v. Durant (1905), 189 Mass. 173, 75 N. E. 221, where this question was involved the court said: "There is nothing to show that there was any conveyance of the land and buildings by them to themselves as a firm or that it was agreed or understood that the land and buildings should be regarded as partnership property, and they were not so entered on the books. It is plain that the use of them for partnership purposes did not of itself convert them into partnership assets or conclusively show an intention to treat them as such," citing Grubb's Appeal (1870), 66 Pa. 117; Robinson Bank v. Miller, *supra;* Frink v. Branch (1844), 16 Conn. 260; Ware v. Owens (1868), 42 Ala. 212, 94 Am. Dec. 672. See also, Blakeslee v. Blakeslee (1914), 265 Ill. 48, 106 N. E. 470; Grant v. Bannister (1911), 160 Cal. 774, 118 Pac. 253.

32 See Collins v. Decker (1879), 70 Me. 23.

33 See Du Bree v. Albert (1882), 100 Pa. 483; Henry v. Anderson (1881), 77 Ind. 361; Kruschke v. Stefan (1892), 83 Wis. 373, 53 N. W. 679, Burd. Cas. 167.

§ 163. Partnership realty, when deemed personal estate.—For the purpose of facilitating the administration and application of partnership realty to partnership purposes, the fiction of an equitable conversion into that form, *to wit,* personalty, into which it must ultimately be converted in order to be so applied, has been established. This conversion is deemed to result from the devotion of the land to the uses of the partnership, though there is not entire agreement as to the extent to which it will be carried. The English rule is that of "out and out" or complete conversion, and regards partnership realty as partnership capital and as having in all respects the character of personal property;[34] but the American rule is otherwise.[35] In this country, unless there is something to indicate a more complete conversion, as there may be,[36] the partnership realty retains its

[34] See Darby v. Darby (1856), 3 Drew. 495, Ames' Cas. 177, Gilm. Cas. 193.

[35] See Buchan v. Sumner (1847), 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Collumb v. Read (1862), 24 N. Y. 505; Fairchild v. Fairchild (1876), 64 N. Y. 471; Darrow v. Calkins (1897), 154 N. Y. 503, 49 N. E. 61, 61 Am. St. R. 637, 48 L. R. A. 299, Mechem's Cas. 813, Gilm. Cas. 203; Martin v. Morris (1885), 62 Wis. 418, 22 N. W. 525; Brewer v. Browne (1880), 68 Ala. 210; Molineaux v. Raynolds (1896), 54 N. J. Eq. 559, 35 Atl. 536, Burd. Cas. 169, Gilm. Cas. 215; Huston v. Neil (1873), 41 Ind. 504, Gilm. Cas. 200.

[36] Thus, it is sometimes said that an agreement to deal in land as the partnership business, of itself works an out and out conversion in equity. See Rovelsky v. Brown (1891), 92 Ala. 522, 9 So. 182, 25 Am. St. R. 83, Mechem's Cas. 832; Nichols v. Burcham (1913), 177 Mich. 601, 143 N. W. 647; Frost v. Wolf (1890), 77 Tex. 455, 14 S. W. 440, 19 Am. St. R. 761; Ludlow v. Cooper (1854), 4 Ohio St. 1; Buckley v. Doig (1907), 188 N. Y. 238, 80 N. E. 913.

Contra: Carter v. Flexner (1891), 92 Ky. 400, 17 S. W. 851, 13 Ky. L. R. 608.

So there is held to be a conversion where the contract between partners dealing in real estate provided that the title should be taken, held and conveyed by a trustee: Mallory v. Russell (1887), 71 Iowa 63, 32 N. W. 102, 60 Am. Rep. 776. See also Greenwood v. Marvin (1888), 111 N. Y. 423, 19 N. E. 228. Where one of two partners owning firm real estate made a conveyance to his copartner of all his interest in the land in trust to manage the same as partnership property and upon termination of the partnership and closing up of its affairs to pay over to the grantor whatever should be coming to him, this was held to constitute an out and out conversion into personalty as between the partners and their representatives. Darrow v. Calkins

character as such for most purposes, though the firm may deal with it, and equity will regard it, as personalty for the purpose of paying the debts and settling the partnership affairs, to the exclusion of the heirs, widows or creditors of the individual partners.[37] As soon as that purpose is accomplished, however, the remaining realty, it is said, resumes its character as such.[38] It therefore descends to the heir of a deceased partner, and the widow of a deceased partner, as will be seen, is usually held to be entitled to dower in it.[39]

§ 164. —— It must be borne in mind that this theory of conversion is only a fiction, and it, of course, applies to equitable transfers alone. At law, partnership realty is regarded as land, and the legal title to the land devolves and can be conveyed

(1897), 154 N. Y. 503, 49 N. E. 61, 61 Am. St. R. 637, 48 L. R. A. 299, Mechem's Cas. 813, Gilm. Cas.' 203.

See also, Davis v. Smith (1887), 82 Ala. 198, 2 So. 897, Mechem's Cas. 821, Burd. Cas. 182.

37 Thus, in Woodward-Holmes Co. v. Nudd (1894), 58 Minn. 236, 59 N. W. 1010, 27 L. R. A. 340, Mechem's Cas. 810, Burd. Cas. 179, it is said: "During the continuance of the partnership the partners can convey or mortgage it, in the course of their business, whenever they see fit, without their wives joining in the conveyance or mortgage, and the wives would have no dower or other interest in it. This is one of the very objects of treating partnership real estate as personal property; for otherwise the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of them refusing to join in the conveyance or mortgage. They have the same power of disposition over it for the purposes of a dissolution of the partnership, the payment of its debts, and the distribution or division of the capital among themselves; for until that is done the property has not fulfilled its function as personalty, or ceased to be partnership property." So in Rovelsky v. Brown (1891), 92 Ala. 522, 9 So. 182, 25 Am. St. R. 83, Mechem's Cas. 832, it is held that one member of a firm, engaged in the business of buying and selling real estate, can bind the firm by a contract in the firm name for the sale of partnership land, and that such contract will be specifically enforced against all the partners.

As to the effect of a decree of a court of one State upon lands situated in another State, entered in an action to settle the partnership affairs, see Dunlap v. Byers (1896), 110 Mich. 109, 67 N. W. 1067.

38 See Brewer v. Browne (1880), 68 Ala. 210; Strong v. Lord (1883), 107 Ill. 25; Shearer v. Shearer (1867), 98 Mass. 107, Ames' Cas. 185.

39 See *post*, §§ 165, 166.

only in the manner and by the methods appropriate to such property.[40] This legal title, however, will be held in subordination to the rights properly acquired in the dealings with the land as personalty.

So, upon the death of a partner in whom a legal title to firm realty was vested, the legal title descends to his heirs, though the heirs hold it in trust for partnership purposes, and can be compelled to transfer the legal title to those who have properly acquired the equitable title.[41]

§ 165. Dower in partnership land.—The question whether the widow of a partner is entitled to dower in lands belonging to the partnership at the time of his death, has been a prolific source of difficulty. Where the land was owned by her husband, and she had acquired an inchoate right of dower in it, *before the formation of the partnership,* her right is, of course, ordinarily unquestionable unless it has been legally barred when the land was afterwards conveyed to the partnership.[42] But where the land was acquired as partnership land during the partnership, other considerations apply. If when the land was so acquired, the title was taken in the name of the other partner only or of a third person, so that no legal title to it ever vested in her husband, she would not be entitled to dower,[43] unless,

40 "Every such conversion, whether express or implied, complete or partial, is equitable only, and the property can only be conveyed as real estate": Davis v. Christian (1859), 15 Gratt. (Va.) 11, 36. Same: Espy v. Comer (1884), 76 Ala. 501; Duncan v. Duncan (1892), 93 Ky. 37, 18 S. W. 1022, 13 Ky. L. R. 917, 40 Am. St. R. 159. "They [the partners] must observe all the solemnities and convey in the mode recognized by law for the transfer or conveyance of real estate": Ruffner v. McConnel (1855), 17 Ill. 212, 63 Am. Dec. 362, Mechem's Cas. 829.

In a collateral matter, a partner in whose name a legal title stands may properly describe himself as a "freeholder" or land owner: Tattersall v. Nevels (1906), 77 Neb. 843, 110 N. W. 708.

41 See Shanks v. Klein (1881), 104 U. S. 18, 26 L. Ed. 635, Mechem's Cas. 211; Hanway v. Robertshaw (1874), 49 Miss. 758.

42 See Grissom v. Moore (1885), 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742; Ratcliffe v. Mason (1891), 92 Ky. 190, 17 S. W. 438, 13 Ky. L. R. 551; Chase v. Angell (1906), 148 Mich. 1, 108 N. W. 1105, 118 Am. St. R. 568.

43 See Mallory v. Russell (1887), 71 Iowa 63, 32 N. W. 102, 60 Am.

under the law of the State, she was dowable in equitable estates.[44] If a legal title were vested in her husband, it was, by the hypothesis, acquired as partnership land for partnership purposes. The demands of such purposes constitute a charge upon the land which is prior to any interest therein which the individual partner or anyone claiming through him can assert. In its effect upon dower, such a charge is somewhat like a mortgage existing upon land when it was acquired and subject to which the title was taken; such a mortgage would take precedence of any dower right asserted by the widow of the purchaser, and the partnership demands are entitled to a similar priority.[45] When, however, such partnership purposes are satisfied, any land remaining would be a proper subject of dower,[46] unless there had been an "out and out" conversion into personalty. What are the partnership purposes which are thus paramount? They include, in the case of a partnership to deal in land, the sale of the land in the ordinary course of the business, and, in any case, the sale, mortgaging or otherwise disposing of the land to pay the debts of the firm to third persons or to satisfy the claims of the individual partners against the firm arising in the course of the firm's business. As against such claims, there is no right of dower and the wives of the partners need not join in a conveyance of the land.[47]

Rep. 776 (no dower in lands held by trustees for the firm).

44 See Davis v. Green (1890), 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90.

45 See Paige v. Paige (1887), 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799, Mechem's Cas. 217; Woodward-Holmes Co. v. Nudd (1894), 58 Minn. 236, 59 N. W. 1010, 49 Am. St. R. 503, 27 L. R. A. 340, Mechem's Cas. 810, Burd. Cas. 179.

46 See Bennett v. Bennett (1910), 137 Ky. 17, 121 S. W. 495, 22 Am. & Eng. Ann. Cas. 407, and note.

Where two land owners enter into partnership and each conveys to the other an undivided one-half of his land, his wife joining in the conveyance, in order to vest the title in the parties as partners, the wife of each is entitled to dower after the firm purposes are satisfied: Free v. Beatley (1893), 95 Mich. 426, 54 N. W. 910.

47 See Woodward-Holmes Co. v. Nudd, *supra*. See, also, Andrews v. Brown (1852), 21 Ala. 437, 56 Am. Dec. 252, Gilm. Cas. 267; Huston v. Neil (1873), 41 Ind. 504, Gilm. Cas. 200; Dyer v. Clark (1843), 5 Metc. (Mass.) 562, 39 Am. Dec. 697, Gilm. Cas. 196.

§ 166. —— Whether such partnership purposes, in the United States, include the restoration of the partnership capital and profits in *cash*, seems to be more or less in dispute. Where the partnership was one to deal in land—and therefore resulting in an "out and out" conversion, such a restoration is a partnership purpose. But in other cases than those of "out and out" conversion, the prevailing rule seems to be to regard what is left, after debts and equities are adjusted, as *land*, and then, even if it became necessary to sell all the land in order to get out enough to satisfy those charges, the proceeds of the residue would be regarded as land, in which the widow might have dower,[48] though there would be no dower in such a case as against the purchaser.

Usually the widow will be found to be contending that a surplus is land in order that she may get dower in it as such; but occasionally, where her distributive share in personalty under the statutes would exceed the value of her dower, she will be found insisting that the surplus is personalty. The same conditions which would support her claim in the former case would defeat it in the latter, and *vice versa*.[49]

The Uniform Partnership Act excludes dower. It provides that "a partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs or next of kin."[50]

48 See Buchan v. Sumner (1847), 2 Barb. (N. Y.) Ch. 165, 47 Am. Dec. 305; Foster's Appeal (1873), 74 Pa. 391, 15 Am. Rep. 553; Shearer v. Shearer (1867), 98 Mass. 107, Ames' Cas. 185; Lenow v. Fones (1886), 48 Ark. 557, 4 S. W. 56; Carter v. Flexner (1891), 92 Ky. 400, 17 S. W. 851, 13 Ky. L. R. 608.

In Woodward-Holmes Co. v. Nudd (1894), 58 Minn. 236, 59 N. W. 1010, 49 Am. St. R. 503, 27 L. R. A. 340, Mechem's Cas. 810, Burd. Cas. 179, the court speaks of the restoration and division of the capital as one of the purposes which will precede re-conversion to realty. Only inchoate rights of dower were here involved, as no partner had died.

In Leaf's Appeal (1884), 105 Pa. 505, although one partner had died the partnership was not dissolved but was going on with all accounts and equities yet unsettled.

The Uniform Partnership Act, sec. 38, provides for a final distribution "in cash," unless otherwise agreed.

49 See Shearer v. Shearer (1867), 98 Mass. 107, Ames' Cas. 185; Lenow v. Fones (1886), 48 Ark. 557, 4 S. W. 56; Hughes v. Allen (1894), 66 Vt. 95, 28 Atl. 882.

50 Sec. 25, subd. *e*.

§ 167. Bona fide purchaser from partner having legal title.—Partnership lands, therefore, when found to be such, may be subjected to the claims of the partnership creditors, and the latter take precedence over the creditors of an individual partner in whose name the legal title stands, and over a transfer by such partner of the legal title to any one not a *bona fide* purchaser. But a *bona fide* purchaser or mortgagee of partnership lands, in ignorance that they were such, from the partner having the legal title of record, will be protected as against both the other partners and creditors.[51]

§ 168. —— Notice from possession by the firm.—Whether, in such a case, the fact that the firm is in possession of the land is notice of its rights, is a question upon which there seems to be some difference in opinion. Where the possession does not appear to be in accord with the state of the title, *e. g.*, where the title seems to be in a third person or in less than the entire number of partners, there the possession seems to give notice. Where, however, the possession and the title appear to be in accord, as where all of the partners have the title apparently as tenants in common, it has been held in some cases that there is no notice.[52] On the other hand, it is said in an English case that even in such a case the possession of the firm as such,—as where the land is the seat of the firm's business,—is notice of *some* arrangement with the apparent owners and therefore is notice of whatever kind of an arrangement it may turn out to be, as, for example, that the land is held as partnership property.[53]

51 See Norwalk Nat. Bank v. Sawyer (1882), 38 Ohio St. 339; McNeil v. Congregational Society (1884), 66 Cal. 105; Seeley v. Michell (1887), 85 Ky. 508, 4 S. W. 190, 9 Ky. L. R. 86; Tarbell v. West (1881), 86 N. Y. 280; Kepler v. Savings & Loan Co. (1882), 101 Pa. 602. See, also, National Union Bank v. National Mechanics' Bank (1895), 80 Md. 371, 30 Atl. 913, 27 L. R. A. 449, 45 Am. St. R. 350, Mechem's Cas. 204; Goldthwaite v. Janney (1894), 102 Ala. 431, 15 So. 560, 28 L. R. A. 161, Mechem's Cas. 804, Burd. Cas. 176.

52 See Hammond v. Paxton (1885), 58 Mich. 393, 25 N. W. 321; Robinson Bank v. Miller (1894), 153 Ill. 244, 38 N. E. 1078, 46 Am. St. R. 883, 27 L. R. A. 449, Mechem's Cas. 195, Burd. Cas. 165.

53 See Cavender v. Balteel (1873), L. R. 9 Ch. App. 79. To same ef-

§ 169. Interest of surviving partner in firm realty.—Upon the dissolution of the partnership by death, the entire legal title to all the partnership personalty vests, as will be seen hereafter,[54] in the survivor. With respect of the partnership realty, however, a somewhat different rule prevails. The real estate, though treated as personalty in the United States for many purposes, retains its character as realty so far as the exigencies of the partnership affairs will permit. The legal title to it—unless it had been vested for the firm in the name of one partner only who chances to be the survivor—descends, as has been seen,[55] to the heirs but subject to the partnership needs; the lien of the survivor still exists, and an equitable title vests in the surviving partner for the purpose of paying the firm debts and settling up the partnership affairs in substantially the same manner that the legal title to the personal assets vests in him. As such survivor he may, therefore, convey, when necessary, the equitable title to part or all of the partnership realty, and the court will then require the heirs or other holders of the legal title to convey that legal title to the person who has purchased the equitable title from the surviving partner.[56] If he happens to be vested with the entire legal title, as for example where the land was originally conveyed to him alone for the firm, or where during the partnership the partner since deceased conveyed the legal title to the one who now survives in trust,[57] he may convey the entire legal title. He may do so also where by the provisions of the deceased partner's will a testamentary

fect: Bergeron v. Richardott (1882), 55 Wis. 129, 12 N. W. 384; Duryea v. Burt (1865), 28 Cal. 569; Churchill v. Proctor (1883), 31 Minn. 129, 16 N. W. 694.

54 See *post*, §§ 402, 403.

55 See *ante*, § 163.

56 See Shanks v. Klein (1881), 104 U. S. 18, 26 L. Ed. 635, Mechem's Cas. 211; Dyer v. Clark (1843), 5 Metc. (Mass.) 562, 39 Am. Dec. 697, Ames' Cas. 251, Gilm. Cas. 196; Walling v. Burgess (1889), 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Tillinghast v. Champlin (1856), 4 R. I. 173, 67 Am. Dec. 510; Buffum v. Buffum (1861), 49 Me. 108, 77 Am. Dec. 249; Delmonico v. Guillaume (1845), 2 Sand. Ch. (N. Y.) 366, Burd. Cas. 161; Hartnett v. Stilwell (1904), 121 Ga. 386, 49 S. E. 276, 104 Am. St. R. 151. 17/242.

57 See Darrow v. Calkins (1897), 154 N. Y. 503, 49 N. E. 61, 61 Am. St. R. 637, 48 L. R. A. 299, Mechem's Cas. 813, Gilm. Cas. 203.

power of sale has been vested in him;[58] and also, of course, where after the death the heirs of the deceased partner give him a power of attorney to convey the legal title vested in them.[59]

[58] See Davis v. Smith (1887), 82 Ala. 198, 2 So. 897, Mechem's Cas. 821, Burd. Cas. 182.

[59] See Southern Cotton Oil Co. v. Henshaw (1889), 89 Ala. 448, 7 So. 760.

CHAPTER VII.

OF THE RIGHTS AND DUTIES OF PARTNERS TOWARDS EACH OTHER.

§ 170. Duty to exercise good faith.—The relation of partners to each other is one of great confidence and trust, and the law demands from them the exercise of the highest integrity and good faith toward each other. Each one is bound to use the partnership property and exercise his partnership powers for the benefit of the firm and not for himself alone. Profits made in the course of the partnership belong to the firm, and one partner will not be permitted to make gain for himself at the expense of the firm. Secret commissions made by one partner

upon partnership dealings must be accounted for to the firm, and if one partner takes advantage of his position to acquire for himself that which it was his duty to acquire for the firm, he will be required to transfer it to the firm. So one partner will not be permitted, either directly or indirectly, to buy of or for himself or to sell to or for himself on the partnership account, without the knowledge and consent of the other partners; and in their dealings with each other, in relation to partnership matters, each is required to make a full disclosure of all facts within his knowledge affecting the transaction. This duty of good faith is intensified when one partner is conducting the business alone as managing partner.[1]

[1] See Brooks v. Martin (1863), 2 Wall. (U. S.) 70, and Kimberley v. Arms (1888), 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764, as to the duties of a managing partner. See, also, Trego v. Hunt (1896), App. Cas. 7, Mechem's Cas. 247, Burd. Cas. 602.

See Hodge v. Twitchell (1885), 33 Minn. 389, 23 N. W. 547, Mechem's Cas. 862, and Newell v. Cochran (1889), 41 Minn. 374, 43 N. W. 84; Bloom v. Lofgren (1896), 64 Minn. 1, 65 N. W. 960, Burd. Cas. 501, as to secret commissions made by one partner; Caldwell v. Davis (1887), 10 Colo. 481, 15 Pac. 696, 3 Am. St. R. 599; Barnes v. Clark (1918), — S. Dak. —, 169 N. W. 527; Butler v. Prentiss (1899), 158 N. Y. 49, 52 N. E. 652; Harlow v. La Brum (1897), 151 N. Y. 278, 45 N. E. 859, Burd. Cas. 502, as to the duty to make full disclosure in dealings with each other; Johnson's Appeal (1886), 115 Pa. St. 129, 2 Am. St. R. 539, and Mitchell v. Reed (1874), 61 N. Y. 123, 19 Am. Rep. 252, Mechem's Cas. 864, Gilm. Cas. 419, that if one partner takes a renewal in his own name of an existing lease to the firm, it inures to the benefit of the firm. This seems to be true even though there is to be a dissolution of the firm, because the chance of renewal is a firm asset. See also Knapp v. Reed (1911), 88 Neb. 754, 130 N. W. 430, 32 L. R. A. (N. S.) 869; Johnson's Appeal (1886), 115 Pa. 129, 8 Atl. 36, 2 Am. St. R. 539; Deutschman v. Dwyer (1916), 223 Mass. 261, 111 N. E. 877. Renewal of contract: Williamson v. Monroe (1900), 101 Fed. 322; National Wire Bound Box Co. v. Healy (1911), 110 C. C. A. 613, 189 Fed. 49. Same principle: Pike's Peak Co. v. Pfuntner (1909), 158 Mich. 412, 123 N. W. 19. See, also, to the effect that one partner who buys up a claim against the firm at a discount must give the firm the benefit: Easton v. Strother (1881), 57 Iowa 506; that one who buys in property belonging to the firm, as upon a sale on execution, must hold for the firm: Railsback v. Lovejoy (1886), 116 Ill. 442, 6 N. E. 504; Roby v. Colehour (1890), 135 Ill. 300, 25 N. E. 777; that purchase of firm property through a confederate will be set aside:

§ 171. Duty to devote himself to advancement of firm's interests.—In a recent case wherein there was, in fact, an express agreement that each should reasonably devote his time and attention to the partnership affairs, the court said that this fact did not materially alter the situation, "for undoubtedly in the absence of express agreement to the contrary a partner is impliedly bound thus reasonably to devote himself to the advancement of the co-partnership of which he has become a member."[2] Persistent failure to do so would usually constitute a good reason for dissolving the partnership; it would usually furnish a ground for the recovery of damages; but, as will be seen in the following section, it would furnish no ground to claim an accounting for the profits which the recreant partner made in outside ventures while he was neglecting the partnership business, unless those ventures were such as ought to have been undertaken for the partnership because they were within the scope of its business.

Winstanley v. Gleyre (1893), 146 Ill. 27, 34 N. E. 628; that insurance of firm property, taken in the name of one partner, inures to the firm: Tebbetts v. Dearborn (1883), 74 Me. 392, Mechem's Cas. 871; that one partner may not apply firm property to his own uses: Morrison v. Blodgett (1836), 8 N. H. 238, 29 Am. Dec. 653; that one partner may not through a third person secretly purchase firm assets sold on dissolution: Jones v. Dexter (1881), 130 Mass. 380, 39 Am. Rep. 459, Mechem's Cas. 873, and note; whether one partner may avail himself of information acquired as a partner to aid him in carrying on another business in competition with the firm: Aas v. Benham (1891), 2 Ch. 244; Latta v. Kilbourn (1893), 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169, Mechem's Cas. 260, Burd. Cas. 503, Gilm. Cas. 425.

Products of partnership activity inure to the partnership: Whitney v. Dewey (1907), 86 C. C. A. 21, 158 Fed. 385; Jennings v. Rickard (1887), 10 Colo. 395, 15 Pac. 677, Gilm. Cas. 421; Hurst v. Brennen (1913), 239 Pa. 216, 86 Atl. 778, 34 Ann. Cas. 428; Burton v. Wookey (1822), 6 Madd. 367, Gilm. Cas. 418.

But defendant was not charged as a trustee where, after the termination of the partnership, he bought for himself the property which the partnership had been created to sell to others at a profit: Kayser v. Maugham (1885), 8 Colo. 232, 6 Pac. 803.

[2] Barclay v. Barrie (1913), 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, 29 Ann. Cas. 1143.

§ 172. Duty not to carry on other business to prejudice of firm.—Express stipulations in the partnership articles respecting the right of all or any of the partners to engage in other business are common and often desirable. The partners may agree that a certain partner shall not, or that no partner shall, engage or be interested in any other business. Equally, they may agree in their articles or otherwise that one or more partners may carry on other business, or be relieved in whole or in part from giving their time and efforts to the firm business; but in the absence of such an agreement, a partner has no right to give his time, skill or efforts to another business or firm to the prejudice of his partners. If without such consent he carries on the same business as that of the firm and in competition with it, and thus makes profits which ought to have enured to the firm, he may be compelled to account to the firm for the profits which he makes,[3] but he will not be compelled to account for the profits if the business is a different and non-competing one.[4] In the latter case, an action for damages would ordinarily be the legal remedy.[5] The violation of express covenants may also be enjoined.[6]

[3] See Goldsmith v. Eichold (1891), 94 Ala. 116, 10 So. 80, 33 Am. St. R. 97; Todd v. Rafferty (1878), 30 N. J. Eq. 254; Holmes v. Darling (1913), 213 Mass. 303, 100 N. E. 611; Hurst v. Brennen (1913), 239 Pa. 216, 86 Atl. 778, 34 Ann. Cas. 428; Wiggins v. Markham (1906), 131 Iowa 102, 108 N. W. 113.

[4] See Aas v. Benham (1891), 2 Ch. 244; Latta v. Kilbourn (1893), 150 U. S. 524, 14 S. Ct. 201, 37 L. ed. 1169, Mechem's Cas. 260, Burd. Cas. 503, Gilm. Cas. 425; Metcalfe v. Bradshaw (1893), 145 Ill. 124, 33 N. E. 1116, 36 Am. St. R. 478, Mechem's Cas. 875.

As to the right of the partnership to claim the benefit of inventions made by one partner during the partnership, see Belcher v. Whittemore (1883), 134 Mass. 330, Burd. Cas. 515; National Wire Bound Box Co. v. Healy (1911), 110 C. C. A. 613, 189 Fed. 49.

[5] Thus in Dean v. MacDowell (1877), 8 Ch. Div. 345, where there was an express agreement that neither partner would engage in other business, and one partner did engage in other business of a different and non-competing sort, it was said that for this breach of contract there might be a dissolution or in some cases an injunction or an action for damages, but not a bill in equity to compel an accounting of the profits made in the other business. It was conceded that no actual damages could be proved.

[6] See Levine v. Michel (1883), 35 La. Ann. 1121.

"If a member enter into a transaction in his own behalf, which is within the scope of the partnership business," said the court in one case, "his copartner may insist that it is a fraud upon him and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and it is not available to third persons for the purpose of fixing a liability upon the partnership when such claim has not been asserted." [7]

Clearly, however, the fact that a partner makes profits in outside transactions is, of itself, a matter of no concern to his copartners if, in doing so, he violated no duty to the firm or contravened no partnership agreement.[8] Equally, also, is it no breach of duty, in a partner who has not agreed to do so, not to admit his copartners into, or furnish them funds to join, his legitimate outside ventures.

§ 173. Duty to exercise care and skill.—It is the duty of each partner to his copartners and he impliedly if not expressly agrees, to transact the business of the firm with reasonable care, skill, diligence and economy; and if the firm sustains injury by reason of his failure to do so, he must bear the loss,[9] though in matters of judgment he will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud.[10] The fact that he is the managing partner increases the scope of his duty but does not change the measure of his responsibility.[11]

Obviously, however, one partner has no just ground for put-

7 Lockwood v. Beckwith (1858), 6 Mich. 168, 72 Am. Dec. 69.

8 See Latta v. Kilbourn, *supra;* Shrader v. Downing (1914), 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389; Dennis v. Gordon (1912), 163 Cal. 427, 125 Pac. 1063; Wheeler v. Sage (1863), 1 Wall. (68 U. S.) 518, 17 L. ed. 646. But compare Kyle v. Griffin (1915), 76 W. Va. 213, 85 S. E. 559.

9 See Yetzer v. Applegate (1891), 83 Iowa 726, 50 N. W. 66; Gordon v. Moore (1890), 134 Pa. 486, 19 Atl. 753; Carlin v. Donegan (1875), 15 Kans. 495; Bohrer v. Drake (1885), 33 Minn. 408, 23 N. W. 840.

10 See Charlton v. Sloan (1888), 76 Iowa 288, 41 N. W. 303.

11 Exchange Bank v. Gardner (1897), 104 Iowa 176, 73 N. W. 591; Hall v. Sannoner (1884), 44 Ark. 34; Poole v. Koons (1911), 252 Ill. 49, 96 N. E. 556; Northen v. Tatum (1909), 164 Ala. 368, 51 So. 17.

ting a loss upon his copartner where the former was as much at fault as the latter,[12] nor may he properly complain that his copartner did not do some act or take some precaution which the complaining partner was under equal duty and had equal power to do or take.[13]

Equally obviously, also, would the latter rule be modified where the partner complained of had the matter exclusively in his charge or was the managing partner, and the other had no knowledge or opportunity which would enable him to protect himself.

The measure of responsibility which the firm owes to third persons for a partner's acts or omissions is not necessarily the one which is to govern that partner's responsibility to his copartners; for it is entirely obvious that the firm may assume to third persons a responsibility which it was not the intention, as between themselves, that the partner in question should assume.

§ 174. Duty to conform to partnership agreements.—It is also the duty of each partner to conform to all of the agreements, regulations and restrictions imposed by the partnership articles, and to confine his acts within the scope and limits fixed for the partnership business. If, by reason of his breach of duty in these respects, a loss happens to his partners, he must indemnify them.[14]

Thus, where the partners expressly agreed that no one of them should sign, accept or indorse negotiable paper except for

12 See Insley v. Shire (1895), 54 Kan. 793, 39 Pac. 713, 45 Am. St. R. 308, Mechem's Cas. 270.

13 See Lyons v. Lyons (1903), 207 Pa. 7, 56 Atl. 54, 99 Am. St. R. 779, Mechem's Cas. 880; Chalmers v. Chalmers (1889), 81 Cal. 81, 22 Pac. 395 (Cases wherein the partner who complained that the other had not collected debts, had equal opportunity to collect them himself).

14 See Murphy v. Crafts (1858), 13 La. Ann. 519, 71 Am. Dec. 519, Mechem's Cas. 275, Gilm. Cas. 438; McCoy v. Crossfield (1909), 54 Ore. 591, 104 Pac. 423; Looney v. Gillenwaters (1872), 58 Tenn. (11 Heisk) 133; Haller v. Willamowicz (1861), 23 Ark. 566 (here the agreement was that one partner should not take part in the business, and caused loss by doing so).

Violation may be waived: Weeks v. McClintock (1887), 50 Ark. 193, 6 S. W. 734.

their own legitimate purposes, and one of them used the firm name for the accommodation of the third person in such a way that the firm was held liable, the offending partner was compelled to make good the loss to his partners.[15] The same ruling was made where the partners had expressly agreed not to give firm credit to relatives, and one of them did so to the loss of the firm.[16] And where one partner who had stipulated to render certain services for the firm refused without reasonable cause to do so, it was held that he was answerable to his partners for the value of the services.[17]

§ 175. Duty of partners to keep accounts—Right of inspection.—It is the right of every partner to have true and proper accounts kept of the partnership transactions, and to have these accounts, at all reasonable times, open to his inspection at the place of business. The general duty of keeping the formal books of accounts may, by the articles or other agreement, be devolved upon one partner, or upon a clerk; but even in such a case, as well as when there is no agreement, it is the duty of each partner to make and keep, or furnish to the proper person to keep, correct accounts of such partner's own transactions for the firm. Where a partner fails in his duty in this regard, every reasonable presumption will be made against him upon the final accounting.[18]

15 Murphy v. Crafts, *supra.*

16 McCoy v. Crossfield, *supra.*

17 Marsh's Appeal (1871), 69 Pa. St. 30, 8 Am. Rep. 206.

18 See Kelly v. Greenleaf (1843), 3 Story (U. S. C. C.) 105; Webb v. Fordyce (1880), 55 Iowa 11, Mechem's Cas. 276; Holden v. Thurber (1909), 72 Atl. (R. I.) 720; Hall v. Clagett (1877), 48 Md. 223; Pierce v. Scott (1861), 37 Ark. 308; Pomeroy v. Benton (1882), 77 Mo. 64; Diamond v. Henderson (1879), 47 Wis. 172; Knapp v. Edwards (1883), 57 Wis. 191, 15 N. W. 140; Chandler v. Sherman (1877), 16 Fla. 99; Clarke v. Clarke (1919), — Va. —, 99 S. E. 664.

It occasionally happens that the parties have been so negligent in the keeping of accounts that no just and reasonable conclusion can be reached by the court. In such a case the court will dismiss the bill. It "will not grope its way in utter darkness, and undertake to create and establish a claim upon mere contingencies or the preponderance of mere possibilities or probabilities." Ryman v. Ryman (1901), 100 Va. 20, 40 S. E. 96.

Here, of course, as in other cases, one partner could not properly complain where the failure to keep the account was as much his own fault as that of his copartner.[19] Equally, also, would the duty of one partner be increased where he was the managing partner.[20]

Formal and expert bookkeeping is not ordinarily expected of a partner; but an honest, full and intelligible account of his transactions is not too much to expect.

Upon the general subject the Uniform Partnership Act provides: "The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them."[21]

§ 176. Duty to consult with each other.—As will be seen in the following section, every partner has presumptively an equal right and an equal voice in the conduct of the partnership affairs. This does not mean, of course, that all of the partners must participate in every transaction, or even that all must consult together before any one of them may do any act in the usual and ordinary conduct of the business. The very creation of the partnership results in a general agency in each partner for the ordinary course of the business and until revoked. But with reference to unusual and unexpected matters that can not fairly be regarded as covered by the original or general agreements, the case is different. Trifling and insignificant acts, though unusual, may be easily disposed of, but in every important exigency in the partnership affairs, where one partner is about to act, he should consult with his partners unless the circumstances are such as to prevent or excuse him from so doing. So, also, should he, in any case in which it may reasonably be supposed that the other partner had special information which should be taken into account before the act was done. Thus,

19 Where a bookkeeper is employed by the firm, his errors are not to be charged to one partner unless he was in some way responsible for them. Folsom v. Marlette (1897), 23 Nev. 459, 49 Pac. 39, Burd. Cas. 570.

20 See McAlpine v. Millen (1908), 104 Minn. 289, 116 N. W. 583; Gay v. Householder (1912), 71 W. Va. 277, 76 S. E. 450, Ann. Cas. 1914 C, 297; Benedetto v. DiBacco (1919), — W. Va. —, 99 S. E. 170.

21 Sec. 19.

where one partner, without consulting his copartner—whose knowledge of the subject because he had originally handled the transaction would have rendered the purchase unnecessary—bought in for a large sum an apparent but really unfounded claim against the firm real estate, it was held that his act was gross negligence and that he could not require his copartner to contribute to the expense of the purchase.[22]

§ 177. Right of each partner to share in management, knowledge and control of the business.—Unless they have agreed otherwise, it is the right of each partner to take an equal part in the transaction of the firm's business. Each has an equal right to information about its business and projects, to have free access to its books and accounts, and to participate generally in the conduct of its affairs.[23] "Although one may have an interest only in the profits and not in the capital," said the court in one case,[24] his right to participation is the same because "his rights are involved in the proper conduct of the affairs of the firm, so that profits may be made."

Upon these subjects, the Uniform Partnership Act provides: "Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability."[25]

"All partners have equal rights in the management and conduct of the partnership business."[26]

The right of a partner to a voice in the management of the business does not usually take the form of a right to *vote*, but it is that in substance, and, in the case of large partnerships managed by elected agents, it would usually take that form.

§ 178. Right of partner to extra compensation.—In the absence of special agreement, a partner is not entitled to com-

[22] Yorks v. Tozer (1894), 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. R. 395, Mechem's Cas. 278, Gilm. Cas. 440.

[23] Katz v. Brewington (1889), 71 Md. 79, 20 Atl. 139, Mechem's Cas. 929, Gilm. Cas. 433; Harris v. Harris (1901), 132 Ala. 208, 31 So. 355; Einstein v. Schnebly (1898), 89 Fed. 540; Hartman v. Woehr (1867), 18 N. J. Eq. 383.

[24] Katz v. Brewington, *supra*.

[25] Sec. 20.

[26] Sec. 18, subd. *e*.

pensation for his services for the partnership, but must be content with his share of the profits, if any.[27] It makes no difference that his services are more valuable than those of any other partner, or that he performs a greater portion of the duties than any other.[28] Nor does the fact that one partner is disabled by sicknesss from rendering any service give another partner, who performs it all, a claim for compensation, for such sickness is one of the risks incident to the relation.[29] Even where one partner, after dissolution by death or otherwise, winds up the business of the firm, he is not ordinarily entitled to extra compensation out of the proceeds;[30] though he has, under various circumstances, been held to be entitled to it where, after dissolution by death, he carries on the business successfully with the consent of those interested, until it could be wound up.[31]

[27] Lindsey v. Stranahan (1889), 129 Pa. 635, 18 Atl. 524, Mechem's Cas. 279, Gilm. Cas. 435; Major v. Todd (1890), 84 Mich. 85, 47 N. W. 841; Godfrey v. White (1880), 43 Mich. 171, 5 N. W. 243; Hyre v. Lambert (1892), 37 W. Va. 26, 16 S. E. 446; Ligare v. Peacock (1884), 109 Ill. 94; Redfield v. Gleason (1888), 61 Vt. 220, 17 Atl. 1075, 15 Am. St. R. 889; Cameron v. Francisco (1875), 26 Ohio St. 190; Ruggles v. Buckley (1910), 99 C. C. A. 73, 175 Fed. 57, 27 L. R. A. (N. S.) 541, 20 Ann. Cas. 1057; Wisner v. Field (1902), 11 N. Dak. 257, 91 N. W. 67; Caldwell v. Leiber (1839), 7 Paige (N. Y.) Ch. 483; Consaul v. Cummings (1911), 222 U. S. 262, 32 Sup. Ct. 83. But see Mattingly v. Stone (1896), 35 S. W. (Ky.) 921, 18 Ky. L. R. 187, Burd. Cas. 516. Where there was a promise to pay it, an action at law may be maintained for its recovery: Paine v. Thacher (1841), 25 Wend. (N. Y.) 450.

[28] See Burgess v. Badger (1888), 124 Ill. 288, 14 N. E. 850; Williams v. Pederson (1907), 47 Wash. 472, 92 Pac. 287, 17 L. R. A. (N. S.) 384 and Note.

[29] See Heath v. Waters (1879), 40 Mich. 457.

[30] See Barry v. Jones (1872), 58 Tenn. (11 Heisk.) 206, 27 Am. Rep. 742 (surviving partner); Maynard v. Richards (1897), 166 Ill. 466, 46 N. E. 1138, 57 Am. St. R. 145 (surviving partner); Smith v. Knight (1893), 88 Iowa 257, 55 N. W. 189 (surviving partner); Consaul v. Cummings (1911), 222 U. S. 262, 32 Sup. Ct. 83 (surviving partner); *In re* Aldridge [1894], 2 Ch. 97 (surviving partner who had made no profits).

[31] See Robinson v. Simmons (1888), 146 Mass. 167, 15 N. E. 558, 4 Am. St. R. 299; Zell's Appeal (1889), 126 Pa. 329, 17 Atl. 647; Condon v. Callahan (1905), 115 Tenn. 285, 89 S. W. 400, 112 Am. St. R. 833, 1 L. R. A. (N. S.) 643; Maynard v. Richards (1897), 166

If one partner is thus ordinarily not entitled to extra compensation for his services, it is all the more clear that he will not be so entitled, where he has wrongfully excluded his partner from participation in the business.[32]

The Uniform Partnership Act reaffirms the general rule, though, contrary to what is believed to be the weight of authority, it gives compensation to the surviving partner.[33]

§ 179. Same subject—May be agreement to pay it.—But there may be an agreement to pay a partner for his services as such, and this agreement may be express or implied. "Where it can be fairly and justly implied," said the court in one case,[34] "from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained." It has been so implied, for example, where one partner gave his whole time to strangers for a salary which he retained, or devoted his entire time and energy to his own separate business, leaving the claimant partner to manage the firm business alone.[35] It

Ill. 466, 46 N. E. 1138, 57 Am. St. R. 145; Cameron v. Francisco (1875), 26 Ohio St. 190; Thayer v. Badger (1898), 171 Mass. 279, 50 N. E. 541, Gilm. Cas. 435.

32 Hannaman v. Karrick (1893), 9 Utah 236, 33 Pac. 1039.

33 Sec. 18, subd. *f*. "No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

34 Emerson v. Durand (1885), 64 Wis. 111, 24 N. W. 129, 54 Am. Rep. 593.

35 Emerson v. Durand, *supra;* Morris v. Griffin (1891), 83 Iowa 327, 49 N. W. 846; Levi v. Karrick (1862), 13 Iowa 344; Mondamin Bank v. Burke (1914), 165 Iowa 711, 147 N. W. 148; Maynard v. Maynard (1917), 147 Ga. 178, 93 S. E. 289; Rains v. Weiler (1917), 101 Kan. 294, 166 Pac. 235, L. R. A. 1917 F, 571. See, also, Askew v. Springer (1884), 111 Ill. 662; Weeks v. McClintock (1887), 50 Ark. 193, 6 S. W. 734; Lassiter v. Jackman (1882), 88 Ind. 118.

In Mondamin Bank v. Burke, *supra*, the court, while recognizing the general rule, said "where one partner has had full charge of the partnership business, attending to practically all its affairs while the other partners have tacitly or expressly acquiesced therein and devoted their own time and energies wholly to their personal affairs, an agreement to compensate the active partner will be much more readily implied than where all the partners

has been implied from the acquiescence and course of dealing of the partners.[36] "Unusual conditions" or "exceptional circumstances," it is said, may justify it.[37]

Where one partner is expressly to be paid in consideration of extra services, he will not be entitled to pay if such services are not rendered, even though he was disabled by illness.[38]

Where one partner carries on the business under such circumstances that he would not otherwise be entitled to extra compensation, it has been held that he cannot establish a right to it, by acquiescence, by crediting it to himself on the firm books, if the other partner knew nothing of that fact and for that reason did not object.[39]

§ 180. Liability of partner for not performing agreed service. —Even though, as has just been seen, one partner may not be entitled to extra compensation where he performs more than his *pro rata* share of the work, still if a partner undertakes to perform some particular service or line of service for the firm and without justification fails to do so, making it necessary to employ some other person to perform the agreed service or otherwise causing direct loss to the firm, the amount of such expense or loss may properly be chargeable against the defaulting partner on a partnership accounting.[40] Whether an action at law

are also giving some degree of active attention to the promotion of the common interest."

But in Lindsey v. Stranahan (1889), 129 Pa. 635, 18 Atl. 524, Mechem's Cas. 279, extra compensation was denied to one partner who did all the work.

36 Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Rains v. Weiler, *supra*. As to validity of subsequent promise to pay in consideration of past extra services, see Gray v. Hamil (1889), 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72 (applying the Georgia Code).

37 See Hoag v. Alderman (1903), 184 Mass. 217, 68 N. E. 199; Maynard v. Maynard (1917), 147 Ga. 178, 93 S. E. 289.

38 See Kinney v. Maher (1892), 156 Mass. 252, 30 N. E. 818.

39 Lindsey v. Stranahan, *supra*.

40 See Marsh's Appeal (1871), 69 Pa. 30, 8 Am. R. 206; Hart v. Myers (1891), 59 Hun (N. Y.) 420, 13 N. Y. S. 388; Stegman v. Berryhill (1880), 72 Mo. 307; Miller v. Freeman (1900), 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, Mechem's Cas. 894; Lay v. Emery (1899), 8 N. Dak. 515, 79 N. W. 1053.

Inability from sickness to render

for damages may be maintained by the other partner will depend upon considerations discussed in a later section.[41]

§ 181. Partner's right to return of advances.—A partner has the right to have returned to him the amount of his advances, loans and proper disbursements made to or on account of the firm, which were not made as part of or additions to his contributions to the permanent capital of the firm,[42] and which were not rendered necessary by the partner's own default or made in violation of the partnership agreement.[43] Such advances, as will be seen hereafter, take priority in the order of payment out of the firm's assets over contributions to capital, though they are, of course, subordinate to the payment of the firm debts to non-partners.[44]

The time at which the partner would be entitled to demand the return or repayment of such advances would depend largely upon the agreement or circumstances under which they were made. His remedy to compel repayment would be affected by several considerations. He could not ordinarily sue for them at law, though, if they were represented by the firm's negotiable paper at least, he could often transfer them to a third person who could sue at law.[45] His remedy in equity for an accounting before a final accounting would in many cases be doubtful.[46]

§ 182. Right of partner to interest on money advanced—On capital.—By the earlier authorities, at least, a partner who

purely personal services would doubtless cause an exception, as in other similar cases.

41 See *post*, § 214.

42 See Lindley on Partnership (7th ed.), p. 419; Folsom v. Marlette (1897), 23 Nev. 459, 49 Pac. 39; Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. R. 311, Mechem's Cas. 692; Baker v. Mayo (1880), 129 Mass. 517.

43 Partner may not charge copartners with loans or advances made in violation of the partnership articles and not otherwise assented to: McFadden v. Leeka (1891), 48 Ohio St. 513, 28 N. E. 874, Mechem's Cas. 280.

44 See *post*, § 469.

45 See Carpenter v. Greenop (1889), 74 Mich. 664, 42 N. W. 276, 16 Am. St. R. 662, 4 L. R. A. 241, Mechem's Cas. 296; Knaus v. Givens (1892), 110 Mo. 58, 19 S. W. 535; Jennings v. Pratt (1899), 19 Utah 129, 56 Pac. 951.

46 See Lord v. Hull (1904), 178 N. Y. 9, 70 N. E. 69, 102 Am. St. R. 484, Mechem's Cas. 920.

advances money for partnership purposes is usually held to be not entitled to interest upon it, in advance of a partnership accounting, and a balance thereby found to be due, unless there has been an agreement express or implied to pay interest, though by some authorities it is allowed.[47] Mercantile usage, however, and the course of dealing between the partners may be sufficient to sustain an implication of a promise to pay interest.[48] "Slight circumstances," said the court in one case,[49] "may be sufficient to show such an undertaking."

By the modern authorities, on the other hand, interest is more readily allowed, and sums, distinct from capital, which may fairly be regarded as *loans* to the firm, are often held to draw interest wherever a similar loan to a third person would do so.[50]

47 See Prentice v. Elliott (1883), 72 Ga. 154; Clark v. Warden (1880), 10 Neb. 87; Dexter v. Arnold (1823), 3 Mason (U. S. C. C.) 284; Gilman v. Vaughan (1878), 44 Wis. 646.

More modern cases such as Lamb v. Rowan (1903), 83 Miss. 45, 35 So. 427, and Ice v. Kilworth (1911), 84 Kan. 458, 114 Pac. 857, 35 L. R. A. (N. S.) 220 (with Note), also adopt this view of no interest.

48 See *per* Knight Bruce, L. J., in *Ex parte* Chippendale (1853), 4 DeG. M. & G. 19.

49 Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424.

50 See Rodgers v. Clement (1900), 162 N. Y. 422, 56 N. E. 901, 76 Am. St. R. 342; Baker v. Mayo (1880), 129 Mass. 517; Mack v. Engel (1911), 165 Mich. 540, 131 N. W. 92; Coldren v. Clark (1895), 93 Iowa 352, 61 N. W. 1045; Matthews v. Adams (1896), 84 Md. 143, 35 Atl. 60.

A share of profits apportioned to a partner, but left unwithdrawn by him, but subject to withdrawal at his pleasure at any time, would ordinarily, in the absence of some special circumstances or an agreement of the parties, have slight claim to rank as an advance or loan to the firm so as to be entitled to interest and still less to be regarded as a fresh contribution to capital so as to draw interest under an agreement to pay interest on capital. See Dinham v. Bradford (1869), L. R. 5 Ch. App. 519; Tutt v. Land (1873), 50 Ga. 339.

One partner who loans money to another partner personally, even though to enable the latter to make his contributions to firm expenses, is entitled to interest from the borrowing partner: Bartlett v. Boyles (1909), 66 W. Va. 327, 66 S. E. 474.

Liability to interest on sums withdrawn—One partner who has overdrawn, etc., *held* not liable to the firm for interest, in the absence of express or implied agreement to pay or of fraud or concealment in the matter: Atherton v. Whitcomb (1894), 66 Vt. 447, 29 Atl. 674; Gilman v. Vaughan (1878), 44 Wis.

§ 183. —— Contributions to capital, on the other hand, do not draw interest in the absence of an agreement to pay it.[51] Each partner's right to share in the profits is supposed to compensate him for the use of his capital. It is immaterial, in this respect, that the contribution to capital of the partner who claims the interest is greater than that of his co-partner.[52] Agreements to pay interest upon capital are not infrequently made.[53]

The Uniform Partnership Act,[54] provides that "A partner, who in aid of the partnership, makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."

"A partner shall receive interest on the capital contributed by him only from the date when repayment should be made."

646; Kemmerer v. Kemmerer (1892), 85 Iowa 193, 52 N. W. 194; Wendling v. Jennisch (1892), 85 Iowa 392, 52 N. W. 341; Sweeney v. Neeley (1884), 53 Mich. 421, 19 N. W. 127; Brenner v. Carter (1902), 203 Pa. 75, 52 Atl. 178, especially where one had overdrawn about as much as the other: Atherton v. Whitcomb, *supra;* Harris v. Carter (1888), 147 Mass. 313, 17 N. E. 649 (no implication of agreement to pay under such circumstances).

But, *contra,* see Forsyth v. Butler (1907), 152 Cal. 396, 93 Pac. 90.

Where firm is borrowing money and paying interest to operate upon, obligation of partner to pay interest on his overdrafts is more readily found. Forsyth v. Butler, *supra.*

If a partner is allowed interest on advances, he should be charged interest on his withdrawal: Boreing v. Wilson (1908), 128 Ky. 570, 108 S. W. 914.

Where there is an agreement to allow interest on capital sums and charge interest on withdrawals, but no date is agreed upon, it must be computed to end of partnership: McCall v. Moss (1885), 112 Ill. 493.

51 See Rodgers v. Clement (1900), 162 N. Y. 422, 56 N. E. 901, 76 Am. St. R. 342; Moore v. Westbrook (1911), 156 N. Car. 482, 72 S. E. 842, Ann. Cas. 1913 A, 168; St. Paul Trust Co. v. Finch (1893), 52 Minn. 342, 54 N. W. 190.

One partner not liable for interest on unpaid capital: Wilson v. McCarty (1877), 25 Grant's Ch. (U. Can.) 152.

Where there was an agreement to pay interest: Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311, Mechem's Cas. 692; Winchester v. Glazier (1890), 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Juilliard v. Orem (1889), 70 Md. 465, 17 Atl. 333.

52 See Desha v. Smith (1852), 20 Ala. 747; Harris v. Carter (1888), 147 Mass. 313, 17 N. E. 649.

53 See, *e. g.,* Whitcomb v. Converse, Winchester v. Glazier, *supra.*

54 Sec. 18 (*c*) and (*d*).

§ 184. Right of partners to have partnership property applied to partnership debts.—It is the right of each partner to have all of the partnership property applied so far as it may be necessary to the payment of the debts and liabilities arising out of the partnership, and for the enforcement and protection of this right he is often said to have a lien upon or equity in the property.

Whether the right or equity of the partners is strictly to be deemed a lien, as it is so often called, is perhaps open to question, though the name cannot be regarded as of great importance while the right itself, by whatever name it may be called, is clearly settled both in reason and authority.[55]

Out of this right grow two rules of much importance:

§ 185. —— Partner may not apply partnership property to his own uses.—*First.* One partner may not, without the consent of the other, apply the partnership property to his own uses or to his own debts, and of this the parties who deal with him must take notice at their peril.

One partner, therefore, without the express or implied consent of his co-partners, may not pledge, mortgage or assign specific partnership property as security or payment of his own debts; he may not apply partnership funds in satisfaction of his own obligations; he may not use the firm's name or credit on his private account; he may not set off a private account against a debt due the firm: in all these and similar cases the firm is not bound, and the firm's property, funds or credits may be recovered, unless the other party is in a situation to claim the protection afforded to a *bona fide* holder for value and without notice.[56]

[55] See *post*, chapter XIX, on the Lien of Partners.

[56] See Davies v. Atkinson (1888), 124 Ill. 474, 16 N. E. 899, 7 Am. St. R. 373 and note; Cannon v. Lindsay (1887), 85 Ala. 198, 3 So. 676, 7 Am. St. R. 38; Janney v. Springer (1889), 78 Iowa 617, 43 N. W. 461, 16 Am. St. R. 460; Farwell v. St. Paul Trust Co. (1891), 45 Minn. 495, 48 N. W. 326, 22 Am. St. R. 742; Bruckett v. Downs (1895), 163 Mass. 70, 39 N. E. 776; Rogers v. Betterton (1894), 93 Tenn. 630, 27 S. W. 1017; Cowen v. Hardware Co. (1892), 95 Ala. 324, 11 So. 195.

As to the effect of the guilty part-

The right of one partner to make such an application of the partnership assets with the previous consent or subsequent ratification of the other partners is clear enough, where the claims of the partnership creditors are not thereby impaired. Whether it may be done with such consent at the expense of the partnership creditors depends upon other considerations, similar to those involved in the following section, and hereafter more fully to be examined.

§ 186. —— **Claims of partnership creditors based on rights of partners.**—*Secondly*. Upon dissolution of the partnership and a distribution of its assets by a court, this right will be enforced (subject, of course, to any valid liens or charges created or incurred before the court acquired control), based upon the presumption that such is the wish of each partner, and the partnership creditors will be given a preference in the partnership assets over the individual creditors of the partners. The rule is sometimes stated, as will be more fully seen hereafter,[57] that the partnership creditors have a lien upon, or an absolute right to priority of payment out of, the partnership property; but the weight of modern authority is rather to the effect that their rights are derivative and based upon this right of the partners to have the firm property applied to the partnership debts.[58] As is said in one case: "The rule that obtains in the distribu-

ners' act upon his right to be a party to an action to recover, see *post*, § 331.

Where partner wrongfully uses firm funds in paying for and improving lands for the benefit of his wife, equity will charge the lands to the extent of the benefit so conferred: Brown v. Orr (1909), 110 Va. 1, 65 S. E. 499, 135 Am. St. R. 912.

[57] See *post*, Ch. XX.

[58] See Winslow v. Wallace (1888), 116 Ind. 324, 17 N. E. 923, Mechem's Cas. 658; Purple v. Farrington (1889), 119 Ind. 164, 4 L. R. A. 535, 21 N. E. 543; Ellison v. Lucas (1891), 87 Ga. 224, 27 Am. St. R. 242, 13 S. E. 445; Reyburn v. Mitchell (1891), 106 Mo. 365, 27 Am. St. R. 350, 16 S. W. 592; Goldsmith v. Eichold Bros. (1891), 94 Ala. 116, 33 Am. St. R. 97, 10 So. 80; Arnold v. Hagerman (1888), 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93, Mechem's Cas. 602, Gilm. Cas. 223; Hundley v. Farris (1890), 103 Mo. 78, 23 Am. St. R. 863, 12 L. R. A. 254, 15 S. W. 312; Carver Machine Co. v. Bannon (1887), 85 Tenn. 712, 4 Am. St. R. 803, 4 S. W. 331.

tion of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine, for the benefit and protection of the partners respectively. Partnership creditors have no lien upon partnership property. Their right to priority of payment out of the partnership assets over the individual creditors is always worked out through the lien of the partners."

The fuller treatment of this subject is, however, reserved for a later chapter; and the effect of the old and new statutes against fraudulent conveyances will there be considered.

§ 187. Partner's right to contribution from copartners.—As will be seen hereafter,[59] the obligation of those contractual debts and liabilities which are binding upon the firm is the joint obligation of all the partners and not the several obligation of any of them; they should therefore be borne by all the partners and not by one alone. So with regard to the torts for which the firm is liable: while the person injured may often sue the partners either jointly or severally,[60] still, as between the partners themselves, the liability, when not caused by the culpable act or default of the partner seeking contribution,[61] is usually one to be borne by all of them. It results, then, that if one partner pays or is compelled to bear more than his just share of such debts and liabilities, he is, when not himself culpably responsible for them, entitled to demand that his co-partners shall, for his relief, contribute their due proportion thereof.[62]

So if, in the conduct of the partnership affairs, one partner is called upon to advance money for partnership purposes, or fairly and in good faith incurs an obligation on the firm account, he is entitled to reimbursement from the firm for his

59 See *post*, § 308.

60 See *post*, § 312.

61 As to this, see *ante*, § 173.

62 See Forbes v. Webster (1829), 2 Vt. 58; Lyons v. Murray (1888), 95 Mo. 23, 8 S. W. 170, 6 Am. St. R. 17; Downs v. Jackson (1864), 33 Ill. 464, 85 Am. Dec. 289, Gilm. Cas. 436; Northen v. Tatum (1909), 164 Ala. 368, 51 So. 17; Brownell v. Steere (1889), 128 Ill. 209, 21 N. E. 3; Phillips v. Blatchford (1884), 137 Mass. 510; Logan v. Trayser (1890), 77 Wis. 579, 46 N. W. 877; Smith v. Ayrault (1888), 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311; Sperry v. Tulley (1915), 76 W. Va. 106, 84 S. E. 1067.

outlay, and to be indemnified by the firm against such obligation.[63]

The partner's right to reimbursement or indemnity, however, will not arise if the demand, with respect of which he claims it, was one which by agreement he was to bear alone, or if it was not fairly and in good faith incurred, or if the necessity for it arose only through his own culpable negligence, bad faith or breach of duty.[64]

The Uniform Partnership Act provides that "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."[65]

This Act also has a special provision respecting contribution after dissolution, which will be referred to later.

§ 188. —— On illegal transactions.—"There is a saying," remarks Mr. Justice Lindley,[66] "that there is no contribution

63 See Wheeler v. Arnold (1874), 30 Mich. 304.

64 See McFadden v. Leeka (1891), 48 Ohio St. 513, 28 N. E. 874, Mechem's Cas. 280 (no contribution for debt incurred in violation of partnership articles); Thomas v. Atherton (1878), 10 Ch. Div. 185 (managing partner of a mine held not entitled to contribution where damages had been awarded against him for encroaching upon the adjoining property under circumstances characterized by the court as "rash or reckless" and as involving "very serious and culpable neglect on his part"); Clayton v. Davett (1897), 38 Atl. (N. J.) 308 (no contribution to payment of damages recovered against partner, who seeks contribution, because of his own fraud); Yorks v. Tozer (1894), 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. R. 395, Mechem's Cas. 278 (no contribution toward payment made grossly negligently); *In re* Worcester Corn Exchange (1853), 3 DeG. M. & G. 180 (no contribution as to debts which were unauthorized); Loy v. Alston (1909), 96 C. C. A. 578, 172 Fed. 90 (partner who wrongfully excludes his copartner from all part in management not entitled to contribution for debts subsequently incurred).

But the mere fact that the debt was unwisely incurred, there being no dishonesty or bad faith, is not enough to bar contribution: Charlton v. Sloan (1888), 76 Iowa 288, 41 N. W. 303, Gilm. Cas. 439.

65 Sec. 18, subd. *b*.

66 1 Lindley on Partnership (Ewell's 2d ed.), 378.

Mr. Justice Lindley further says: "The case which presents most difficulty is one in which an unlawful act has been knowingly performed

amongst wrong-doers; but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true that, if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but there is no authority for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but yet imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. The claim of a partner to contribution from his co-partners in respect of a partnership transaction cannot be defeated on the ground of illegality unless the partnership is itself an illegal partnership; or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution when he knew or ought to have known of its illegality. In any of these cases he can obtain no assistance against his co-partners, and must abide the consequences of his own wilful breach of the law.[67] * * * But if the partnership is not itself illegal,

by all the partners, so that all are *in pari delicto*. There is a dictum of Lord Cottenham to the effect that in such a case each partner must bear all the loss he may happen to sustain, and that he cannot require his copartners to share that loss, (Attorney General v. Wilson, Cr. & Ph. 1); but, on the other hand, there is a decision which goes far to show that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort, or a direct violation of some statute, or unless the contract of partnership is itself void on the ground of illegality. It is apprehended that if all the members of a firm were equally guilty of a breach of trust, and one of the firm alone had made it good out of his own money, he would be allowed, in taking the partnership accounts, to charge his copartners, rateably with himself, with the amount paid by him. See Ashurst v. Mason, 20 Eq. 225; Jackson v. Dickinson [1903], 1 Ch. 947."

67 Quoted with approval in Smith v. Ayrault (1888), 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

The question of the right to contribution where partnership was illegal is discussed, *ante*, § 46.

See, also, Estate of Ryan (1914), 157 Wis. 576, 147 N. W. 993. (The partners were not "conscious wrongdoers. They were acting honestly and in good faith, but under a mistaken conception of the law, and hence the right of contribution exists"): Davis v. Gelhaus (1886), 44 Ohio St. 69, 4 N. E. 593 (a known illegal transaction, contribution denied); Armstrong Co. v. Clarion Co.

and if the partner claiming contribution has not himself been personally guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act."

§ 189. —— Upon what basis determined.—Partners may and should and not infrequently do expressly agree upon the ratio in which the profits, losses and expenses of the business are to be shared. Where such an agreement exists, it is ordinarily conclusive.[68] Where no such agreement is found and no other determining data appear, the presumption will be that they are to share equally in the gains and burdens of the business.[69] This will be so even though their respective contributions to the firm capital may be unequal.[70]

The rule of the Uniform Partnership Act will be found in the footnotes.

§ 190. —— How enforced.—Whether one partner has really paid more than his just proportion on the partnership account is often, if not usually, a question requiring some investigation of the whole partnership accounts to determine. If one partner

(1870), 66 Pa. 218, 5 Am. Rep. 368; Jacobs v. Pollard (1852), 64 Mass. (10 Cush.) 287, 57 Am. Dec. 105; Spalding v. Oakes (1869), 42 Vt. 343; Bailey v. Bussing (1859), 28 Conn. 455; Acheson v. Miller (1853), 2 Ohio St. 203, 59 Am. Dec. 663.

68 See Magilton v. Stevenson (1896), 173 Pa. 560, 34 Atl. 235, Gilm. Cas. 445.

69 See Stein v. Robertson (1857), 30 Ala. 286; Griggs v. Clark (1863), 23 Cal. 427; Roach v. Perry (1854), 16 Ill. 37; Warring v. Arthur (1895), 98 Ky. 34, 17 Ky. L. R. 605, 32 S. W. 221, Burd. Cas. 518, Gilm. Cas. 441; Randle v. Richardson (1876), 53 Miss. 176; Worthy v. Brower (1885), 93 N. Car. 344; Eilers Music House v. Reine (1913), 65 Oreg. 598, 133 Pac. 788; Logan v. Dixon (1889), 73 Wis. 533, 41 N. W. 713.

70 See Lindley on Partnership (7th ed.), p. 385.

Uniform Partnership Act, sec. 18(a), subject to any agreement between them, "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property, and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership, according to his share in the profits."

has done so upon one occasion, it may be that his co-partner upon some other occasion has paid as much or more under similar circumstances for which he also has a claim against the firm; and how the final balance will stand may be a matter of some uncertainty, which it will require a general accounting to make clear. As will be seen in a later chapter,[71] courts of law are not usually an appropriate forum for taking such an account, and the parties are required to go into a court of equity. The result, therefore, is, that a partner's claim for contribution or reimbursement is usually one to be enforced only in a court of equity.[72] It is not, however, always so. The claim may arise in respect of some isolated transaction;[73] it may be that the other partner has recognized its validity and expressly promised to pay his share without reference to a partnership accounting;[74] it may be that the demand did not arise until after an accounting or a dissolution and accounting:[75] in these and like cases, as will be seen in the chapter referred to, the objection to legal proceeding may be removed, and a court of law rather than of equity may take jurisdiction.

A distinction of importance may depend upon whether the action for contribution is at law or in equity: at law, ordinarily, each can be held only for his numerically *pro rata* share, while in equity the insolvent ones and those out of the jurisdiction are not counted.[76]

§ 191. Right of other partners to indemnity for losses caused by a partner's misconduct.—Contradistinguished from a right

71 See *post*, Chap. IX.

72 See Lawrence v. Clark (1840), 9 Dana (Ky.) 257, 35 Am. Dec. 133; Kennedy v. McFaddon (1811), 3 H. & J. (Md.) 194, 5 Am. Dec. 434; Murray v. Herrick (1895), 171 Pa. 21, 32 Atl. 1125; Bishop v. Bishop (1886), 54 Conn. 232, 6 Atl. 426; McDonald v. Holmes (1892), 22 Oreg. 212, 29 Pac. 735; Crossley v. Taylor (1882), 83 Ind. 337; Warring v. Arthur, *supra*.

73 See Dorwart v. Ball (1904), 71 Neb. 173, 98 N. W. 652.

74 See *post*, §§ 211, 212.

75 See Logan v. Trayser (1890), 77 Wis. 579, 46 N. W. 877; Sears v. Starbird (1889), 78 Cal. 225, 20 Pac. 547; Fry v. Potter (1880), 12 R. I. 542, Mechem's Cas. 882; Clarke v. Mills (1887), 36 Kan. 393, 13 Pac. 569, Mechem's Cas. 884.

76 See Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep.

to contribution, may be the right of the other partners to insist that the whole of a charge, loss or liability shall be borne by the partner by whose misconduct it was caused. In the earlier sections of this chapter it has been pointed out that each partner owes to his co-partner the performance of certain duties, like the duty to act in good faith towards his partners, to keep proper accounts, to exercise reasonable care and diligence, to observe the terms of the partnership agreements, and so on. If one partner violates any one of these duties and thereby causes loss or liability to the firm, not only would the wrong doer be entitled to no contribution if the consequences should fall in the first instance upon him, but if they fall upon his co-partners in whole or in part they may insist that he shall bear the entire loss and indemnify them entirely against it.[77]

311, Mechem's Cas. 692; Henry v. Jackson (1865), 37 Vt. 431; Scott v. Bryan (1887), 96 N. Car. 289, 3 S. E. 235; Sloan v. Gibbes (1899), 56 S. Car. 480, 35 S. E. 408, 76 Am. St. R. 559; Gross v. Davis (1888), 87 Tenn. 226, 11 S. W. 92, 10 Am. St. R. 635.

See also Uniform Partnership Act, sec. 40(d), and sec. 18(a) quoted above.

[77] See Murphy v. Crafts (1858), 13 La. Ann. 519, 71 Am. Dec. 519, Mechem's Cas. 275, Gilm. Cas. 438; McCoy v. Crossfield (1909), 54 Oreg. 591, 104 Pac. 423; Yorks v. Tozer (1894), 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. R. 395, Mechem's Cas. 278, Gilm. Cas. 440; Smith v. Loring (1826), 2 Ohio 440; Kintrea v. Charles (1865), 12 Grant's Ch. (Up. Can.) 123.

CHAPTER VIII.

OF DEALINGS BETWEEN PARTNERS AND WITH THE FIRM.

§ 192. In general.—Questions may arise respecting dealings had between the partners themselves or with their firms but not immediately involving third persons. These cases will chiefly fall under one of three heads: Dealings between the partners; Dealings between the firm and a partner; and Dealings between firms having one or more partners in common.

§ 193. Dealings between partners.—With respect of matters which do not relate to or involve the partnership, partners are, of course, as free to deal with each other as though they were not partners.[1] With respect of matters which relate to the partnership but do not involve partnership dealings, the partners may also freely deal with one another. Thus, for example, one may borrow from another the money he is to contribute to the partnership capital or buy from another the interest in property which he is to put into the partnership, and the obligations so incurred may be enforced in the same manner as though no partnership existed.[2] So, even though the matter

[1] Thus one partner may make another his agent with reference to the former's private business affairs and the case is in no way affected by the fact that they are partners as to other matters. See Paine v. Moore (1844), 6 Ala. 129; Volk v. Roche (1873), 70 Ill. 297.

[2] See Cook v. Canny (1893), 96 Mich. 398, 55 N. W. 987, Mechem's Cas. 904; Bull v. Coe (1888), 77 Cal. 54, 18 Pac. 808, 11 Am. St. R. 235, Mechem's Cas. 905; Bates v. Lane (1886), 62 Mich. 132, 28 N. W. 753; Bright v. Carter (1903), 117 Wis. 631, 94 N. W. 645; Hoskins v. Dickinson (1900), 124 Mich. 11, 82 N. W. 660.

be one directly involving partnership affairs, the partners may, so far as their obligations to each other are concerned, make practically any lawful agreement which they please. Thus one may assume and agree to pay a particular firm debt or portion of the firm debts and hold his co-partner harmless therefrom;[3] one may sell or assign to the other all his interest in specific property or assets of the firm;[4] they may agree among themselves as to the manner in which the partnership duties or labor shall be distributed,[5] or how or how not the partnership funds or credits shall be employed;[6] and, in general, they may segregate any portion of the partnership affairs and make it the subject of a special agreement which is to control as between themselves.

§ 194. Dealings between firm and partner.—Although, as has been seen, the firm is not a legal entity, it is constantly recognized that there may be dealings between a partner and his firm in its collective capacity. Thus a partner may sell or lease property or loan money to the firm; and, on the other hand, he may buy or rent property from the firm or borrow money from it.[7] And though, as will be seen, there may be difficulty, in many cases, in enforcing claims so arising by an action at law because of the necessity of the partner being both a plaintiff and defendant,[8] yet they may be enforced in equity in actions for an accounting, and they may often be so assigned to third

[3] See Edwards v. Remington (1881), 51 Wis. 336, 8 N. W. 193, Mechem's Cas. 907.

[4] See Beede v. Fraser (1894), 66 Vt. 114, 28 Atl. 880, 44 Am. St. R. 824, Mechem's Cas. 300; Shurtleff v. Willard (1837), 19 Pick. (Mass.) 202; Coggschell v. Munger (1893), 54 Mo. App. 420; Holt v. Howard (1903), 77 Vt. 49, 58 Atl. 797.

[5] See Miller v. Freeman (1900), 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, Mechem's Cas. 894.

[6] See Murphy v. Crafts (1858), 13 La. Ann. 519, 71 Am. Dec. 519, Mechem's Cas. 275, Gilm. Cas. 438; McCoy v. Crossfield (1909), 54 Oreg. 591, 104 Pac. 423.

[7] See Carpenter v. Greenop (1889), 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. R. 662, Mechem's Cas. 296; Henry v. Anderson (1881), 77 Ind. 361; Allen v. Anderson (1883), 13 Ill. App. 451; Lassiter v. Stainback (1896), 119 N. Car. 103, 25 S. E. 726.

[8] See *post*, § 199.

Even though the creditor partner might not be able to sue, he might, in many cases, pay himself out of

parties as to enable the latter to enforce them at law even though the assignor might not be able to do so.[9] Where, in such dealings, the firm gives its negotiable promissory note to a partner, or the partner gives one to the firm, the cases are numerous in which the actual and *bona fide* transferee of the note has been permitted to sue at law.[10] The giving of such a note by the firm to a partner, payable at a time prior to any agreed or probable termination of the partnership, would be strong evidence of an intention to segregate that item from other partnership accounts and make it an independent obligation.[11]

How the partner creditor would stand in competition with the general creditors of the firm who were not partners, is a question for later consideration.[12]

§ 195. —— Whether money advanced by a partner to or for the firm is to be regarded as a loan or as a permanent addition to capital, is, when not made clear by some express agreement, frequently a question difficult to decide. It depends largely upon intention, to be deduced often from facts and circumstances.[13] The importance of the question arises chiefly from the standpoint of the time when it is to be repaid, *e. g.*, on demand or at

partnership funds. See Cambre v. Lasseigne (1913), 134 La. 94, 63 So. 680.

9 Whether an assignee may enforce the claim will, of course, be affected by such questions as whether it is assignable, whether the assignee may sue in his own name, whether he takes subject to partnership equities, etc.

10 See Carpenter v. Greenop, *supra;* Jennings v. Pratt (1899), 19 Utah 129, 56 Pac. 951; Wintermute v. Torrent (1890), 83 Mich. 555, 47 N. W. 358; Woodman v. Boothby (1876), 66 Me. 389; Walker v. Wait (1878), 50 Vt. 668; Knaus v. Givens (1892), 110 Mo. 58, 19 S. W. 535; Buchanan v. Mechanics', etc., Institution (1896), 84 Md. 430, 35 Atl. 1099, Burd. Cas. 298; Temple v. Seaver (1853), 65 Mass. (11 Cush.) 314; Roger Williams Nat. Bank v. Hall (1893), 160 Mass. 171, 35 N. E. 66 (may prove it in insolvency proceedings).

But, *contra,* that he takes it subject to the partner's disabilities, see Simrall v. O'Bannons (1847), 46 Ky. (7 B. Mon.) 608.

As to rights of transferee to whom the note was transferred merely to enable him to sue, see Wintermute v. Tarrant (1890), 83 Mich. 555, 47 N. W. 358; Cutting v. Daigneau (1890), 151 Mass. 297, 23 N. E. 839, cited *post,* § 200.

11 See Carpenter v. Greenop, *supra;* Temple v. Seaver, *supra.*

12 See *post,* § 451.

13 See Topping v. Paddock (1879), 92 Ill. 92.

at the expiration of a reasonable time, or only when other capital is repaid upon a final termination of the firm.[14] It may also involve the question of the right to interest upon the amount.[15]

Partners may not force advances upon the firm or charge their copartners for disbursements rendered necessary only by their own default or made in violation of partnership agreements and not assented to by those sought to be charged.[16]

§ 196. Dealings between firms having a common partner.— As there may be dealings between a firm and a partner, so there may be dealings between two firms having one or more partners in common. Thus one firm may sell to or buy of the other, or lend to or borrow money from the other.[17] These obligations, however, as in the former case are subject to the disability that, owing to technical rules concerning parties, the members of the one firm cannot sue the members of the other at law.[18] As will be seen, however, equity will often take jurisdiction,[19] and under the reformed procedure in many States the common law objection has been removed.[20] In many cases also the difficulty may be overcome by assigning the claim to a third person.[21]

14 See *post*, § 464 *et seq.*

15 See *ante*, § 182.

16 See McFadden v. Leeka (1891), 48 Ohio St. 513, 28 N. E. 874, Mechem's Cas. 280.

See also Magilton v. Stevenson (1896), 173 Pa. 560, 34 Atl. 235, where the amount that defendant partner could be made liable for was limited by the articles of partnership.

17 See Bolton v. Puller (1796), 1 Bos. & Pul. 539, Burd. Cas. 187; Bonwit v. Heyman (1895), 43 Neb. 537, 61 N. W. 716.

18 See Green v. Chapman (1854), 27 Vt. 236; Beede v. Fraser (1894), 66 Vt. 114, 28 Atl. 880, 44 Am. St. R. 824, Mechem's Cas. 300; Cole v. Reynolds (1858), 18 N. Y. 74, Mechem's Cas. 293; Aylett v. Walker (1896), 92 Va. 540, 24 S. E. 226; Taylor v. Thompson (1903), 176 N. Y. 168, 68 N. E. 240 (an action for deceit).

In Bosanquet v. Wray (1815), 6 Taunt. 597, Ames' Cas. 442, it is said that no *legal* contract can exist in such a case, "the parties could only so far enter into this contract as to render it available in equity."

19 See *post*, § 233; Cole v. Reynolds, *supra;* Crosby v. Timolat (1892), 50 Minn. 171, 52 N. W. 526; Noyes v. Ostrom (1910), 113 Minn. 111, 129 N. W. 142; Rogers v. Rogers (1847), 40 N. Car. 31; Burrows v. Leech (1898), 116 Mich. 32, 74 N. W. 296, 5 American Law Review 47.

20 See Cole v. Reynolds, *supra.*

21 See Beacannon v. Liebe (1884),

Other disabilities will also suggest themselves, as, for example, that the members of the creditor firm might not compete with the general creditors of the debtor firm in securing payment out of the assets of that firm,[22] as suggested in the second section, preceding.

11 Oreg. 443, 5 Pac. 273. *Contra*, where the assignee stands merely in the position of the assignor: Aylett v. Walker, *supra*.

22 See Bonwit v. Heyman, *supra*.

CHAPTER IX.

OF ACTIONS BETWEEN PARTNERS.

§ 197. Of actions between partners in general.—The question of the remedies which partners may have between themselves involves several considerations of interest and importance. Certain of the rules applicable result from the peculiar relations between the parties, and others from the peculiar nature of the interests involved. As has been already seen, while the law for some purposes regards the firm as a distinct entity, for most purposes the partners must be regarded as individuals. This is usually the rule as respects actions at law. If, therefore, one partner would maintain an action against the partnership, he must sue himself as a partner with the others. If he should recover judgment against the firm, he might be called upon as a member of the firm to pay or satisfy his own judgment. If he bases an action upon his interest in the partnership, it will usually require an accounting and settlement to determine what his interest is. The same difficulties would usually exist if the firm were to sue one partner. These, and other like considerations, have led to the establishment of certain rules respecting the remedies of partners as between themselves which require examination.

I. Actions at Law.

§ 198. In what cases the question arises.—The question of the right to maintain an action at law respecting partnership transactions may arise in four classes of cases: 1. Where the claim is by one partner against the partnership; 2. Where the claim is by the partnership against a partner; 3. Where the claim is by one partner against one or more of his fellow-part-

ners; and 4. Where the claim is between firms which have one or more partners in common.

1. *Partner Against Firm.*

§ 199. One partner cannot sue the firm at law.—1. One partner cannot maintain an action at law against the partnership of which he is a member to recover upon any claim which he may have against the partnership as such. The objections are of two sorts, *First,* there is the difficulty as to *parties.* The claimant is himself a member of the partnership against which he makes the claim, and if he should sue the partnership he must sue himself as one member of it. To be thus both plaintiff and defendant involves an inconsistency which the common law procedure does not permit. *Secondly,* there is the difficulty as to the *nature of the claim.* The claimant contends that the firm owes him. It is, however, ordinarily impossible for him to show, without a final settlement of its accounts, whether the firm really owes him or not. There may be counterclaims of such extent that a final balance would prove him to be the debtor; and to reach this final balance the remedies of the common law are usually not adequate.

He may not sue his partners only (not joining himself as a defendant), for they alone do not owe the debt to him. He may not sue them only, for a *pro rata* part, for that would involve an accounting of that transaction alone, without reference to other transactions which might affect the result.

One partner, therefore, may not sue his partnership at law to recover for his services where there is an agreement to pay; or to recover for advances or loans which he has made to the firm, or for money which he has paid out on its account, or for goods which he has sold to the firm, or for the rent of premises which he has leased to the firm.[1] In all these and like cases,

[1] See King v. Moore (1904), 72 Ark. 469, 82 S. W. 494; Newby v. Harrell (1888), 99 N. C. 149, 6 Am. St. R. 503, 5 S. E. 284; Duff v. Maguire (1868), 99 Mass. 300; O'Brien v. Smith (1889), 42 Kan. 49, 21 Pac. 784; Remington v. Allen (1871), 109 Mass. 47; Mickle v. Peet (1875), 43 Conn. 65; Pico v. Cuyas (1873), 47 Cal. 174.

the remedy of the partner, as will be seen, is to go into a court of equity, praying for an accounting and, usually, for a dissolution.

§ 200. —— Of the two difficulties which thus lie in the way of the action at law the first, that is, the difficulty as to *parties*, is a constant one as long as the partner himself is the plaintiff. The second difficulty, *i. e.*, the difficulty as to the *nature of the claim*, however, is not a constant one. It may be that in a particular case, the claim is a single and simple one which could be easily proved without involving a partnership accounting, or it may be that the firm has so far segregated this claim from the other partnership affairs that it could be shown without reference to the state of the final accounting. This latter fact, however, would not save the case, so long as the objection as to parties remains.

The objection as to parties only might often be avoided by assigning the claim to a non-partner who might then sue all of the partners. Whether, however, the assignment would avoid the second difficulty as to the nature of the claim, would depend upon the circumstances. If the claim were either of the single and simple or of the segregated sort so that no investigation of a complicated partnership account would be necessary, and the jurisdiction were one permitting an assignee to sue in his own name, the assignee of the partner might usually sue at law.[8] If, on the other hand, these latter things were not so,

[8] See Frank v. Anderson (1884), 81 Tenn. 695. Where a partner loans money to the firm and takes the firm's note, the note is valid, though the partner himself cannot sue upon it, and if he indorses to a holder for value, the latter may recover of the firm (Carpenter v. Greenop (1889), 74 Mich. 664, 42 N. W. 276, 16 Am. St. R. 666, 4 L. R. A. 241, Mechem's Cas. 296, Gilm. Cas. 467; Walker v. Wait (1878), 50 Vt. 668; Jennings v. Pratt (1899), 19 Utah 129, 56 Pac. 951; Knaus v. Givens (1892), 110 Mo. 58, 19 S. W. 535; Buchanan v. Mechanics Inst. (1896), 84 Md. 430, 35 Atl. 1099); though this would not be the result if the transfer were merely colorable to enable the transferee to sue (Wintermute v. Tarrant (1890), 83 Mich. 555, 47 N. W. 358; Cutting v. Daigneau (1890), 151 Mass. 297, 23 N. E. 839); or if the note were so transferred that the action must be brought in the name of the assignor. Davis v. Merrill (1883), 51 Mich. 480, 16 N. W. 864.

the assignee would stand in no better situation than the partner himself and he usually could not sue at law.[3]

2. *Firm Against Partner.*

§ 201. Firm cannot sue one partner at law.—2. For similar reasons, the partners as such cannot sue one partner at law to recover upon a claim made against him by the firm. The same difficulty of parties, and the same uncertain character of the claim, exist as where the situation is reversed, as seen in the preceding section.[4]

Thus, the partners as such cannot maintain an action at law against one partner to recover for goods sold to him by the firm, or for the recovery of money due from him to the firm upon his note or otherwise, though a *bona fide* indorsee of the note might sue.[5]

The same general considerations respecting an assignment of the claim by the firm to a nonpartner and the right of the latter to sue, would apply as in the preceding case of the partner against the firm.[6]

§ 202. —— The difficulty as to parties, however, in these cases, has been held to be confined to the state of the parties upon the record. Thus where a partner gave his note to another partner, but the latter was really trustee for the partnership, it was held that the payee might maintain an action at law against the maker, although the recovery was for the benefit of the partnership and if all the partners had been necessary parties plaintiff the action could not have been maintained.[7]

On the other hand, statutory or other requirements that all

[3] See Bullard v. Kinney (1858), 10 Cal. 60, Mechem's Cas. 288.

Compare Simrall v. O'Bannons (1847), 46 Ky. (7 B. Mon.) 608.

[4] See Woodman v. Boothby (1876), 66 Me. 389.

[5] See Parker v. Macomber (1836), 18 Pick. (Mass.) 505; Bank v. Delafield (1891), 126 N. Y. 410, 27 N. E. 797; Burley v. Harris (1836), 8 N. H. 233, 29 Am. Dec. 650, Gilm. Cas. 454; Ivy v. Walker (1880), 58 Miss. 253; Summerson v. Donovan (1910), 110 Va. 657, 66 S. E. 822, 19 Ann. Cas. 253.

[6] See Woodman v. Boothby, *supra*.

[7] See Van Ness v. Forrest (1814), 12 U. S. (8 Cranch) 30, 3 L. ed. 478.

actions shall be prosecuted in the names of the real parties in interest, might destroy the force of the position referred to in the preceding paragraph.

3. *Partner Against Partner.*

§ 203. One partner cannot sue another at law on claim involving partnership transactions.—3. In this case the difficulty as to parties does not arise. By the hypothesis, the firm is not involved as a party on either side. It is simply one partner against another. The difficulty, if any, arises solely from the nature of the claim which the partner is seeking to enforce against his copartner. That claim may arise:—(*a*) Out of partnership transactions; (*b*) Out of matters relating to the partnership, but not constituting partnership transactions; (*c*) Upon matters which were originally partnership transactions but which have been separated and segregated by special agreement; and (*d*) Upon matters having no connection with the partnership.

a. In the first of these cases the claim will usually be that the plaintiff has performed labor for the partnership, or has sold goods or loaned money or rented property to the partnership, or has advanced or paid out money for the partnership, as the result of which the defendant has become indebted to him; or that the defendant has received something due or belonging to the partnership, for a part of which he should account to the plaintiff; and the like. As to this, it is the general rule that one partner cannot sue another partner at law upon a claim against that partner arising out of and involving partnership transactions, unless (1) that claim has, by the agreement of the parties, been in some way segregated and taken out of the domain of the partnership accounts;[8] or (2) unless the part-

[8] See *post*, § 217; Douthit v. Douthit (1892), 133 Ind. 26, 32 N. E. 715 (where the court says, "Where there is an agreement adjusting partnership affairs, and that agreement awards to one partner a specific sum, or creates a specific duty in his favor, he may maintain an action upon a breach of the duty or promise); Beede v. Fraser (1894), 66 Vt. 114, 28 Atl. 880, 44 Am. St. R. 824, Mechem's Cas. 300 (where the court says, "When the parties by an express agreement separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specified sum for that matter, as-

nership accounts, at least so far as that claim is concerned, have been fully settled, and a final balance has been arrived at in his favor, or, as it is frequently expressed, unless there has been an *account stated* between them.[9] If such a balance has been reached in his favor, then, if there is no express promise, the law will usually imply a promise by the other partner to pay it, and the claim becomes, by the accounting and promise, so far transformed from a partnership liability into a personal and private one, that the partner entitled may sue the partner obligated in an action at law.[10] Some courts, however, require an express promise to pay the amount found due and do not raise an implied promise.

§ 204. —— **Reason for the rule.**—The reason for the general rule denying the right to sue at law is that it is ordinarily impossible to determine whether the defendant partner is really indebted to the plaintiff partner or not, until the partnership accounts are settled and the true standing of the parties ascertained; they have not, by implication, agreed to account otherwise; until that is done no debt arises; and the process and remedies afforded by a court of law are not usually adequate or appropriate to the investigation of claims requiring such an accounting.[11] Where, however, the parties themselves have made

sumpsit will lie on the agreement, though the matter arose from the partnership dealing'').

9 See Sadler v. Nixon (1834), 5 B. & Ad. 936, Ames Cas. 453, Gilm. Cas. 451; Remington v. Allen (1871), 109 Mass. 47; Holyoke v. Mayo (1862), 50 Me. 385; Harris v. Harris (1859), 39 N. H. 45; Johnson v. Wilson (1870), 54 Ill. 419; Towle v. Meserve (1859), 38 N. H. 9; Cobb v. Martin (1912), 32 Okla. 588, 123 Pac. 422; Simpson v. Miller (1908), 51 Oreg. 232, 94 Pac. 567.

Fact that partner suing at law for contribution to a debt paid by him did not pay it voluntarily, but was compelled to pay, *held* to make no difference. Sadler v. Nixon, *supra*.

10 See Wycoff v. Purnell (1860), 10 Iowa 332, Mechem's Cas. 286; Pope v. Randolph (1848), 13 Ala. 214; Spear v. Newell (1841), 13 Vt. 288, Mechem's Cas. 311; Holyoke v. Mayo (1862), 50 Me. 385; Douthit v. Douthit, *supra;* Burns v. Nottingham (1871), 60 Ill. 531, Gilm. Cas. 459 (must be a final balance).

11 In Spear v. Newell, *supra*, the court in going over the list of common law actions to see if there was one applicable, said that the common law action of *account* would not

an investigation and have stated the result showing a balance due to one of the partners, the chief objection to a suit at law is obviated and it may therefore be maintained.

The codes of procedure have not in general changed the rule,[12] nor is it dealt with by the Uniform Partnership Act.

§ 205. —— When rule does not apply—Single completed transaction.—The general rule, moreover, has been held not to apply where the partnership was a special one, for a single and finished transaction only, or where all of the partnership affairs have been settled except a single transaction.[13]

§ 206. —— When relation was not a partnership—Joint ventures.—So, finally, if the relation in question was not that of partnership, any rule applicable to that situation only would obviously not operate. Thus with regard to those situations which, as has been seen,[14] are sometimes said to be "joint ventures" rather than partnerships, it has been held in a number of cases that actions at law could be maintained by one associate against another, and that the rule applicable to partner-

lie since (in this case) the defendant had received nothing; *covenant* would not lie because there was no agreement under seal; *assumpsit* would not lie because there was no liquidated or settled balance.

The common law action of *account render* is now generally obsolete though it seems to be retained, in a modified form at least, in a few states.

12 See Emery v. Pease (1859), 20 N. Y. 62.

13 See Fry v. Potter (1880), 12 R. I. 542, Mechem's Cas. 882; Kutz v. Dreibelbis (1880), 126 Pa. 335, 17 Atl. 609; Welch v. Miller (1904), 210 Pa. 204, 59 Atl. 1065; Wheeler v. Arnold (1874), 30 Mich. 304; Clarke v. Mills (1887), 36 Kan. 393, 13 Pac. 569, Mechem's Cas. 884, Gilm. Cas. 458; Crittenden v. Cobb (1906), 156 Fed. 535; Dorwart v. Ball (1904), 71 Neb. 173, 98 N. W. 652; Mills v. Gray (1917), 50 Utah 224, 167 Pac. 358; Feurt v. Brown (1886), 23 Mo. App. 332; Reiser v. Johnston (1917), — Okla. —, 166 Pac. 723, L. R. A. 1918 A. 924; Ledford v. Emerson (1905), 140 N. Car. 288, 52 S. E. 641, 4 L. R. A. (N. S.) 130, Gilm. Cas. 456; Mason v. Sieglitz (1896), 22 Colo. 320, 44 Pac. 588, Burd. Cas. 537.

Court of equity will not, it is said, take jurisdiction where accounts are simple and may therefore be settled at law: Lesley v. Rosson (1860), 39 Miss. 368, 77 Am. D. 679, but it is doubtful if this was a case of a partnership at all.

14 See *ante*, §§ 16, 43.

ship did not prevent.[15] A number of cases, however, have held actions in equity permissible in such cases.[16]

§ 207. One partner may sue another at law upon claim connected with but not constituting partnership transactions.—*b*. But there is a large class of cases involving matters which, though they may in some way be connected with the partnership, do not constitute partnership transactions, but are individual transactions between particular partners, and as to these an action at law may often be maintained. It is the characteristic of these cases that the injury is to the partner as an individual and not to the firm as such. Thus—

§ 208. —— As for not forming partnership as agreed.—A breach of an agreement to enter into partnership, or to permit a person to become partner, may furnish the basis of an action at law, because here, though a partnership was contemplated, it was never created, and there can consequently be no partnership transactions involved, and no necessity for an accounting.[17]

§ 209. —— Or for dissolving contrary to agreement.—For like reasons, an action at law may be maintained by one partner to recover damages against another who has dissolved the partnership in violation of his agreement that it should continue for a definite term.[18]

15 See Clark v. Sidway (1891), 142 U. S. 682, 12 S. Ct. 327, 35 L. ed. 1157; Bruce v. Hastings (1868), 41 Vt. 380, 98 Am. Dec. 592; Jordan v. Soule (1887), 79 Me. 590, 12 Atl. 786, Haven v. Mehlgarten (1857), 19 Ill. 91.

16 See *ante*, §§ 16, 43, note.

17 See Hill v. Palmer (1882), 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703, Mechem's Cas. 303; Treat v. Hiles (1887), 68 Wis. 344, 32 N. W. 517, 60 Am. R. 858.

See also Ramsay v. Meade (1906), 37 Colo. 465, 86 Pac. 1018.

For similar reasons an action at law will lie to recover for services performed under an agreement to launch a partnership: Lawson v. Glass (1881), 6 Colo. 134.

18 See Farwell v. Wilcox (1918), — Okla. —, 175 Pac. 936, 4 A. L. R. 156, and note; McCollum v. Carlucci (1903), 206 Pa. 312, 55 Atl. 979, 98 Am. St. R. 780; Bagley v. Smith (1853), 10 N. Y. 489, 61 Am. Dec. 756, Mechem's Cas. 305; Greenham v. Gray (1855), 4 Ir. Com. L. 501. See, also, Ramsay v. Meade, *supra*. Compare Ryder v. Wilcox (1869), 103 Mass. 24.

See also Uniform Partnership Act, sec. 38(2) (b).

Such an action does not necessarily involve an investigation of the partnership accounts. It might be maintained although no accounts had been agreed upon. Damages for the breach of the contract, and not the recovery of a balance due upon an account, might be what was sought.

The Uniform Partnership Act has a special provision for securing the payment of these damages.

§ 210. —— Or for not furnishing capital as agreed.—An action at law may be maintained by one partner against another to recover damages for the loss sustained by him—not the firm—because of the latter's breach of his agreement with the former to contribute capital or furnish goods or do any other act to start or launch the partnership.[19] "An agreement to pay money or to furnish stock," said the court in a leading case,[20] "for the purpose of launching the partnership, is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his copartner."

By the hypothesis here the agreement is an individual one with the plaintiff, not with the firm; it is usually made before the partnership is formed, and the damages to be recovered are those to which the plaintiff alone is entitled. If the contract is to be deemed one with the firm and for its benefit, other considerations apply which are dealt with in a following section.[21] Moreover, if the damages sought to be recovered by the plaintiff partner are to be measured by the profits which the firm did or might be expected to make, questions as to their

19 See Crater v. Bininger (1871), 45 N. Y. 545; Collamer v. Foster (1854), 26 Vt. 754; Morgan v. Nunes (1877), 54 Miss. 308; Terrill v. Richards (1817), 1 Nott & McC. (S. Car.) 20; Owen v. Meroney (1904), 136 N. Car. 475, 48 S. E. 821, 103 Am. St. R. 952, Gilm. Cas. 461.

20 Cook v. Canny (1893), 96 Mich. 398, 55 N. W. 987, Mechem's Cas. 904, Gilm. Cas. 462. To like effect: Brown v. Tapscott (1840), 6 Mees. & Wels. 119, Ames' Cases 468.

21 See *post*, § 214.

speculative character until made and determined by an accounting, will have to be taken into consideration.

§ 211. —— Or for not reimbursing for capital advanced.—If one partner advances money, or pays for goods, or furnishes any other thing, at the request of the other to enable the latter to supply his portion of the agreed capital, an action at law will lie for reimbursement.[22]

Such contracts are purely personal, and, although they relate to the partnership, they in no way involve any necessity for investigating the partnership accounts.

§ 212. —— Or for not indemnifying as agreed.—If one partner agrees with another to pay a firm debt out of his private funds or to hold the other harmless from liability by reason of any partnership transaction, an action at law may be maintained for a breach of the agreement.[23]

Such an agreement has ordinarily the effect of removing the subject matter of the agreement from the field of partnership affairs, and therefore the common impediment to the action is itself removed. Stipulations of this sort are, perhaps, most frequently made upon dissolution of the firm, but they may be made at any time even though dissolution is not then imminent or contemplated.

§ 213. —— Or for not paying debts assumed.—For similar reasons, if one partner upon dissolution agrees to pay the debts of the firm, or to collect the debts and pay over a share of the

[22] Bates v. Lane (1886), 62 Mich. 132, 28 N. W. 753; Bull v. Coe (1888), 77 Cal. 54, 18 Pac. 808, 11 Am. St. R. 235, Mechem's Cas. 905; Smith v. Kemp (1892), 92 Mich. 357, 52 N. W. 639; Scott v. Campbell (1857), 30 Ala. 728; Sprout v. Crowley (1872), 30 Wis. 187; Currier v. Rowe (1865), 46 N. H. 72; Newman v. Ruby (1903), 54 W. Va. 381, 46 S. E. 172; Elgie v. Webster (1839), 5 M. & W. 518; Haskins v. Curran (1895), 4 Idaho 573, 43 Pac. 559, Burd. Cas. 534. Jones v. Rose (1917), 81 W. Va. 177, 94 S. E. 41, seems more or less opposed.

[23] See Coffee v. Brian (1825), 3 Bing. 54; Miller v. Bailey (1890), 19 Oreg. 539, 25 Pac. 27; Edwards v. Remington (1881), 51 Wis. 336, 8 N. W. 193, Mechem's Cas. 907; Kellogg v. Moore (1881), 97 Ill. 282.

collection, an action at law may be maintained if the agreement is broken.[24]

§ 214. One partner may sue another for breach of partnership agreements.—Actions at law may also be maintained by one partner against another to recover damages for a loss sustained by *him*—not by the *firm*—from a breach of such stipulations or agreements in the partnership articles as were designed for the protection of the partner complaining, as upon a breach of an agreement not to sign the firm name as an accommodation indorser,[25] or of the agreement of one of several partners to personally pay a portion of certain moneys to be advanced for firm use by the plaintiff partner,[26] or of an agreement by one partner with another to see that the latter's contribution to the capital is returned in case he desires to withdraw,[27] and the like.[28]

It is sometimes very difficult to determine whether the covenant or agreement in question is one designed for the benefit of the firm or only of the plaintiff partner individually. It is only where the latter is the case—where the promise is to him, where the damages if recovered would belong to the plaintiff partner personally and not to the firm—that this action will ordinarily lie.[29]

Even in the former case, however, if the transaction in question is not complicated and there are no equities arising out

24 See Thropp v. Richardson (1890), 132 Pa. 399, 19 Atl. 218; Ferguson v. Baker (1889), 116 N. Y. 257, 22 N. E. 400.

Compare Shattuck v. Lawson (1858), 76 Mass. (10 Gray) 405.

25 See Stone v. Wendover (1876), 2 Mo. App. 247; Vance v. Blair (1849), 18 Ohio 532, 51 Am. Dec. 467.

26 See Wills v. Simmonds (1876), 8 Hun (N. Y.) 189; also Madge v. Puig (1877), 12 Hun 15 (reversed on other grounds, 71 N. Y. 608).

27 See Guccione v. Scott (1897), 21 N. Y. Misc. 410, 47 N. Y. S. 475.

28 See Glover v. Tuck (1840), 24 Wend. (N. Y.) 153.

29 See Miller v. Freeman (1900), 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, Mechem's Cas. 894; Ryder v. Wilcox (1869), 103 Mass. 24, Ames' Cas. 455, Burd. Cas. 525; Capen v. Barrows (1854), 1 Gray (Mass.) 376; Buckmaster v. Gowen (1876), 81 Ill. 153.

of the partnership accounts, no sound reason is apparent why the rights of the parties should not be adjusted at law.[30]

§ 215. One partner may sue another for wrongful practices resulting in loss.—And the same rule would apply where one partner, by fraudulent practices, or by any wrongful act, in violation of his duty as a partner, should impose loss upon his partner, not upon the firm, as by putting on him a personal loss or liability by giving the firm note without authority for his private debt, [31] or by ousting his partner from the business,[32] or by injuring the individual property of his partner used in the business,[33] and the like.[34]

It must be kept in mind, in these cases, that if one partner is suing his copartner or a stranger for acts injuring the plaintiff's *interest* in the partnership property, he may fail, not because of the fact that his action is at law but because the value and extent of his interest may not be capable of proof until it has been determined by an accounting.[35] The same distinction is to be made also where the loss is primarily to the firm and not merely to one partner. Thus if one partner wrongfully disposes of the firm property, an action at law against him by his copartner to recover damages may be hampered not only by the fact that they are co-owners but also by the fact that the extent of the plaintiff's loss may not be capable of ascertainment until there has been an accounting.[36]

30 For this reason, the writer ventures to question the soundness of Miller v. Freeman, *supra*.

31 See Calkins v. Smith (1872), 48 N. Y. 614, 8 Am. Rep. 575; Fuller v. Percival (1879), 126 Mass. 381.

In Calkins v. Smith, *supra*, Earl, J., holds that such a fraud is not a fraud upon the *firm;* the guilty partner does not defraud himself, but only his copartner and therefore the action is an individual and not a firm action.

32 See Newsom v. Pitman (1892), 98 Ala. 526, 12 So. 412.

33 See Newby v. Harrell (1888), 99 N. Car. 149, 5 S. E. 284, 6 Am. St. R. 503.

34 See Boughner v. Black (1886), 83 Ky. 521, 7 Ky. L. R. 562, 4 Am. St. R. 174, Mechem's Cas. 916.

35 See Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. 59, 31 Am. St. R. 353, Mechem's Cas. 194; Reed v. Gould (1895), 105 Mich. 368, 63 N. W. 415, 55 Am. St. R. 453.

36 See Wells v. Mitchell (1841), 23 N. Car. (1 Ired.) 484, 35 Am. Dec. 757.

These considerations have frequently been applied in deciding

§ 216. One partner may sue another for fraud in inducing or in settling the partnership, etc.—So an action at law will lie to recover damages for misrepresentations or deceit by one partner in inducing another to become a partner,[37] or, upon dissolution, to take as his share of the partnership assets certain accounts purporting to be firm credits, but which had been deceitfully kept or created by the other partner.[38]

§ 217. One partner may sue upon a partnership transaction by agreement transformed into individual one.—*c.* And even though a given transaction may originally have been a partnership one, it is, in general, true that the partners may, by special agreement, isolate, segregate and transform a partnership transaction into the individual one of one of the partners, and upon matters thus separated from the partnership affairs an action at law may be maintained.[39]

Such special agreement need not be express in the sense that it can only be made by formal words. It may be deduced as the natural and reasonable inference from what they do. Thus

whether one partner may maintain an action at law against another for a conversion of partnership property. It is held in a number of cases that he may not, unless there has already been some accounting or adjustment determining his interest. See Dukes v. Kellogg (1900), 127 Cal. 563, 60 Pac. 44; Couilliard v. Eaton (1885), 139 Mass. 105, 28 N. E. 579; Riddell v. Ramsey (1904), 31 Mont. 386, 78 Pac. 597.

Some cases, on the other hand, have permitted such actions, especially where the partnership was ended, the transactions few, and the adjustment not complicated. See Frith v. Thompson (1918), 103 Kan. 395, 173 Pac. 915, L. R. A. 1918 F 1123; Reis v. Hellman (1874), 25 Ohio St. 180.

37 See Hale v. Wilson (1873), 112 Mass. 444; Rice v. Culver (1880), 32 N. J. Eq. 601; Morse v. Hutchins (1869), 102 Mass. 439.

38 See Crockett v. Burleson (1906), 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263, Gilm. Cas. 464. Compare McAuley v. Cooley (1895), 45 Neb. 582, 63 N. W. 871, Burd. Cas. 535.

39 See Ryder v. Wilcox (1869), 103 Mass. 24, Ames' Cas. 455, Burd. Cas. 525; Purvines v. Champion (1873), 67 Ill. 459; Neil v. Greenleaf (1875), 26 Ohio St. 567; Emery v. Wilson (1879), 79 N. Y. 78; Howard v. France (1871), 43 N. Y. 593, 3 Alb. Law J. 305; Paine v. Thatcher (1841), 25 Wend. (N. Y.) 450; Jackson v. Stopherd (1834), 2 Cr. & M. 361, Ames' Cas. 462, Gilm. Cas. 452.

where the parties specially agree upon terms whose natural and reasonable result is to segregate a particular transaction, they need not also declare in words that this is their intent.[40]

One of the most common of these cases is that wherein some or all of the partners execute and deliver to one partner a negotiable note payable at a date prior to any probable termination of the partnership. Its earlier maturity tends to show that it was not designed to await a final accounting of partnership affairs, and its negotiable character tends to show that it was to be payable absolutely, without regard to the state of the partnership accounts.[41] Even though the payee might not be able to sue at law upon a note so given to him in the firm name (on account of the difficulty as to parties), his transferee might sue.

§ 218. On matters distinct from partnership one partner may sue another.—*d.* As to matters entirely distinct from the partnership affairs, one partner may, of course, sue another as freely as though in respect to other matters they did not sustain the relation of partner.[42]

[40] Thus the making of a promissory note by some of the partners in favor of another is said to be an acknowledgment of the separation of that sum from the partnership account. Bonnafee v. Fenner (1846), 6 Smedes & M. (Miss.) 212, 45 Am. Dec. 278. See, also, Fox v. Firth (1842), 10 M. & W. 131; Wilson v. Wilson (1894), 26 Oreg. 251, 38 Pac. 185, Burd. Cas. 538.

So, where upon closing up the business, it was agreed that one should take a certain lot of property and pay the other a certain sum for his interest in it: Jackson v. Stopherd, *supra.* So, where on dissolution, one partner bought the assets. He may later recover from his former partner money collected by him on a debt due the firm. Glade v. White (1894), 42 Neb. 336, 60 N. W. 556, Burd. Cas. 541.

[41] See Carpenter v. Greenop (1889), 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. R. 662, Mechem's Cas. 296, Gilm. Cas. 467; Wilson v. Wilson (1894), 26 Oreg. 251, 38 Pac. 185, Burd. Cas. 538; Burnes v. Scott (1885), 117 U. S. 582, 6 Sup. Ct. 865, 29 L. ed. 991. Compare Martin v. Stubbings (1886), 20 Ill. App. 381 [s. c. 126 Ill. 387, 18 N. E. 657, 9 Am. St. R. 620]; Sewell v. Cooper (1869), 21 La. Ann. 582. See, also, Conway v. Zender (1913), 154 Wis. 479, 143 N. W. 162.

[42] See Elder v. Hood (1865), 38 Ill. 533; Newsom v. Pitman (1892), 98 Ala. 526, 12 So. 412; Paine v. Moore (1844), 6 Ala. 129.

4. *Firm Against Firm Having Common Partners.*

§ 219. One firm cannot sue another at law if there is a common partner.—4. In the absence of a statute regulating it, one firm cannot maintain an action at law against another firm if there is a partner common to both firms, since such common partner would have to be both a plaintiff and a defendant.[43] The death of the common partner will not remove the impediment as to matters arising before the death, nor will the dissolution of the firm.[44] The nature of the claim is immaterial, if it is an obligation in favor of one firm and against the other as such. The forum for actions in such cases is the court of equity.[45]

It is not permitted, it is said in one case,[46] "that one of the parties should thus appear both as a plaintiff and defendant, in effect prosecuting an action against himself, in which, if a recovery were to be allowed, it would be in his favor and at the same time against himself. Nor, at law, would the contract or agreement between the two firms having a common member be recognized as creating a legal obligation or cause of action. The transaction would be treated as an attempt by a party to enter into a contract with himself.[47] The remedial system of the common law was too inflexible and restricted to enable it to adjust the complex rights and obligations of the parties under such circumstances. But in equity the agreements of the members of firms so related to each other were treated as obligatory, and the fact that one of the parties to the joint contract stood in the position of both an obligor and obligee did not stand in

[43] See Beede v. Fraser (1894), 66 Vt. 114, 28 Atl. 880, 44 Am. St. R. 824, Mechem's Cas. 300; Green v. Chapman (1855), 27 Vt. 236; Denny v. Metcalf (1848), 28 Me. 389; Hall v. Kimball (1895), 77 Ill. 161; Crosby v. Timolat (1892), 50 Minn. 171, 52 N. W. 526, Gilm. Cas. 469; Noyes v. Ostrom (1910), 113 Minn. 111, 129 N. W. 142; Beacannon v. Liebe (1884), 11 Oreg. 443, 5 Pac. 273.

[44] See Bosanquet v. Wray (1815), 6 Taunt. 597, Ames' Cas. 442; *In re* Buchhause (1874), 2 Lowell 331, Gilm. Cas. 572.

[45] See cases cited in first note.

[46] Crosby v. Timolat, *supra*.

[47] Citing Bosanquet v. Wray, 6 Taunt. 597; De Tastet v. Shaw, 1 Barn. & Ald. 664, 669; Leake, Cont. 439, 440; McFadden v. Hunt, 5 Watts & S. 468; Price v. Spencer, 7 Phila. 179.

the way of affording such relief or remedy as might be found to be appropriate and necessary to the ends of justice." [48]

§ 220. —— **Assignee—Code.**—This objection might in many cases be obviated by assignment where the assignee could sue in his own name, and be free from the disabilities affecting the assignor.[49] And in New York it has been held that the code of procedure, in abolishing the distinctions between actions at law and suits in equity, had made it possible to maintain a "civil action" in such cases.[50]

II. Of Actions in Equity.

§ 221. **Equity the proper tribunal in partnership matters.**—The court of equity is the chief and appropriate tribunal for the settlement of all controversies growing out of partnership transactions as such. Its principal function is in winding up the partnership affairs and arriving at the respective interests therein of the partners and creditors, but its aid may often be sought in other matters. Thus—

1. *Specific Performance.*

§ 222. **In what cases granted.**—Something of the power of courts of equity to enforce specific performance of partnership agreements has been already considered in a previous section,[51] and, as there noticed, the jurisdiction is, in most cases, greatly limited by the nature of the case.[52] But such stipulations as

48 Citing 1 Story, Eq. Jur., §§ 679, 680; Haven v. Wakefield, 39 Ill. 509; Chapman v. Evans, 44 Miss. 113; Calvit's Ex'rs v. Markham, 3 How. (Miss.) 343; Hayes v. Bement, 3 Sandf. 394.

49 See Beacannon v. Liebe, *supra*. Not in Virginia: Aylett v. Walker (1896), 92 Va. 540, 24 S. E. 226.

50 See Cole v. Reynolds (1858), 18 N. Y. 74, Mechem's Cas. 292; Mangels v. Shaen (1897), 21 App. Div. 507, 48 N. Y. S. 526, Mechem's Cas. 290. See, also, Gibson v. Ohio Farina Co. (1859), 2 Disney (Ohio) 499, 13 Ohio Dec. 306.

51 See *ante*, § 119.

52 See Scott v. Rayment (1868), L. R. 7 Eq. 112; Morris v. Peckham (1883), 51 Conn. 128; Clark v. Truitt (1899), 183 Ill. 239, 55 N. E. 683; Buck v. Smith (1874), 29 Mich. 166, 18 Am. R. 84, Mechem's Cas. 322; Hercy v. Birch (1804), 9 Ves. 357; Karrick v. Hannaman (1897), 168 U. S. 328, 18 Sup. Ct.

are capable of specific performance may be enforced, either directly,[53] or negatively by an injunction against their breach.[54]

The chief objections which arise to the exercise of the power to grant specific performance in partnership cases are those which inhere in the peculiar nature of the subject. The cases which involve the question fall usually into one or the other of two classes: *First,* those where specific performance is sought of an agreement to become or remain partners; and *Second,* those which involve some incidental right or liability growing out of an established relation, such as agreements to buy or sell, take shares on a valuation, and the like. The cases in the former class are the more difficult. Thus, where the purpose is to compel parties to enter into partnership as agreed, if no time was stipulated for its continuance, of what avail is it to enforce the creation of a partnership which the parties may immediately dissolve?—if a term of continuance was agreed upon, can the court assume the task of constantly watching the parties to observe whether they are performing their duties as partners?

§ 223. Same subject.—In one case[55] in which the question arose, the court, in denying the application, said: "It is extremely plain that the court cannot assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated arrangement as plainly set forth contemplates that his personal skill and judgment shall

R. 135, 42 L. ed. 484; Hyer v. Richmond Traction Co. (1897), 168 U. S. 471, 18 Sup. Ct. 114, 42 L. ed. 547; Marble Co. v. Ripley (1870), 10 Wall. (U. S.) 339, 19 L. ed. 955. Compare England v. Curling (1844), 8 Beav. 129; Somerby v. Buntin (1875), 118 Mass. 279, 19 Am. R. 459, Mechem's Cas. 326; Byrne v. Reid [1902], 2 Ch. 735, Mechem's Cas. 930; Birchett v. Bolling (1817), 5 Munf. (Va.) 442; Wadsworth v. Manning (1853), 4 Md. 59.

53 See cases cited in second and third sections following.

54 See Leavitt v. Windsor Land & Inv. Co. (1893), 4 C. C. A. 425, 54 Fed. 439.

55 Buck v. Smith (1874), 29 Mich. 166, 18 Am. Rep. 84, Mechem's Cas. 322, Gilm. Cas. 479. The court in this case also urged, as a ground for refusing the relief, that, under the contract there involved, it could not make its relief mutual.

be applied and govern according to the shifting needs of property and business. No court is competent to execute such an arrangement."

In another case,[56] involving the same question, the court said: "It is a rule in equity that the court will not decree a specific performance where it has no power to enforce the decree. Hence partnership articles will not be enforced, especially where no time is fixed for its continuance, as either party may dissolve it at pleasure. And even where a time is fixed it is difficult to see how the decree can be enforced. Take this case as an illustration: Is the court to keep its hand on the parties for seventeen years and compel them to carry on this business?"

§ 224. Same subject.—There may, however, be cases in which the court will enforce specific performance of an agreement to *form* a partnership, by requiring the execution of the agreed articles or other similar act, notwithstanding that it may be immediately dissolved. This may be done, for example, where it will secure to a partner the interests in property to which by the partnership agreement he is entitled.[57]

The execution of such deeds, etc., as might be necessary to give full effect to the agreement would fall within the same rule. The act required here is a certain, definite and agreed one, which may be of importance to the protection of the party's interests and which may in some cases be of value even though the enforcement of the remainder of the agreement, *i. e.,* to carry on the partnership so formed for the agreed period may be thought to be beyond the power of the court.[58]

56 Morris v. Peckham (1883), 51 Conn. 128. Same: Clark v. Truitt (1899), 183 Ill. 239, 55 N. E. 683.

57 Somerby v. Buntin (1875), 118 Mass. 279, 19 Am. R. 459, Mechem's Cas. 326; Satterthwait v. Marshall (1872), 4 Del. Ch. 337; Karrick v. Hannaman, *supra.*

58 See Byrne v. Reid [1902], 2 Ch. 735, Mechem's Cas. 930 (where the execution of such deeds as were necessary to give effect to the agreement was held to be within the power of the court. This case, however, was in fact attended by a certain consent order which may have affected the question, though at least one judge intimated that he would have been of the same opinion without that fact). [See comments 3 Columbia Law Review 108]; England v. Curling (1844), 8 Beav. 129.

§ 225. Same subject.—Aside from agreements to become or remain partners, there are some cases relating to partnership in which specific performance may be had. The most common of these are those involving agreements to buy or sell shares upon death or other dissolution,[59] but there are others.[60] Agreements to submit disputed claims to arbitration are more difficult of specific enforcement, but not usually for reasons which are peculiar to partnership.[61]

[59] See Maddock v. Astbury (1880), 32 N. J. Eq. 181, Mechem's Cas. 936, and cases in following note. Compare Cox v. Willoughby (1879), 13 Ch. Div. 863; Neilson v. Iron Co. (1886), 11 App. Cas. 298.

[60] In Lindley on Partnership (7th ed.), 520, 521, it is said: "The court has enforced the following agreements entered into upon or with a view to a dissolution, namely: Agreements not to carry on business within a certain distance or for a certain space of time (Whittaker v. Howe, 3 Beavan, 383; Turner v. Major, 3 Giffard, 442); agreements by one partner to withdraw from a firm and assign his share to his copartners (Gray v. Smith, 43 Ch. D. 208); agreements as to the custody of partnership books and the furnishing of copies thereof (Lingen v. Simpson, 1 Simons & Stuart, 600); agreements that a third party, and he only, shall get in debts (Davis v. Amer, 3 Drew. 64; Turner v. Major, 3 Giff. 442); agreements that the value of the share of an outgoing or a deceased partner shall be ascertained in a specified way and taken accordingly (Morris v. Kearsley, 2 Y. & C. Ex. 139; Essex v. Essex, 20 Beav. 442; King v. Chuck, 17 Beav. 325); agreements that an outgoing partner shall offer his share to his copartners before selling it to other persons (Homfray v. Fothergill, 1 Eq. 567); agreements to grant an annuity to a retiring partner and his widow (Aubin v. Holt, 2 K. & J. 66; Page v. Cox, 10 Hare, 163); agreements not to divulge or make use of a trade secret (Morison v. Moat, 9 Hare, 241.)"

[61] Agreements to submit to arbitration are not usually specifically enforced: Caldwell v. Caldwell (1908), 157 Ala. 119, 47 So. 268; Kennedy v. Monarch Mfg. Co. (1904), 123 Iowa 344, 98 N. W. 796; Wood v. Humphrey (1873), 114 Mass. 185; Miles v. Schmidt (1897), 168 Mass. 339, 47 N. E. 115; Woodruff v. Woodruff (1888), 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; or to take shares at a valuation, where the parties refuse to appoint the valuers or the valuers refuse to act: Vickers v. Vickers (1867), L. R. 4 Eq. 529; Dinham v. Bradford (1869), L. R. 5 Ch. App. 519; Milnes v. Gery (1807), 14 Ves. 400, and the court will not attempt to fix the value otherwise unless valuation by the particular person appears not to have been of the essence of the agreement: Dinham v. Bradford, *supra*.

2. *Of Injunctions.*

§ 226. In what cases granted.—Injunctions are frequently granted upon the application of one partner against his copartner, either before or pending or after a dissolution.

1. *Before dissolution,* and for the very purpose often of obviating the necessity for a dissolution, injunctions may be granted to prevent the commission by partners of acts inconsistent with the terms of their agreement or violating the rights of their copartners. Thus, one partner may be enjoined from obstructing or impeding the business; excluding another partner from his rightful share in the management of the business; interfering with the servants of the firm; removing the books or papers of the firm or excluding his copartner from access to them; using partnership property for individual purposes; engaging in a rival business; extending the partnership transactions beyond the limits agreed upon; publishing a notice of dissolution before the stipulated term has expired, and the like.[62]

2. *Pending an application* for a dissolution or for an accounting, injunction may be issued to restrain one partner from wrongfully interfering with, secreting or disposing of the property, creating new liabilities, and the like.[63]

3. *After dissolution,* one partner may be enjoined from wasting, injuring, disposing of or wrongfully dealing with the assets; from holding out the complainant as being still a partner; from continuing business in violation of his agreement; from using the old firm name in such a way as to render former partners liable, and the like.[64]

62 See Marble Co. v. Ripley (1870), 10 Wall. (U. S.) 339; Leavitt v. Windsor Land & Inv. Co. (1893), 4 C. C. A. 425, 54 Fed. 439; Pirtle v. Penn (1835), 3 Dana (Ky.) 247, 28 Am. Dec. 70, Mechem's Cas. 313, Gilm. Cas. 480; New v. Wright (1870), 44 Miss. 202, Mechem's Cas. 319; Katz v. Brewington (1889), 71 Md. 79, 20 Atl. 139, Mechem's Cas. 929, Gilm. Cas. 433; Van Keuren v. Trenton Mfg. Co. (1861), 13 N. J. Eq. 302; Levine v. Michael (1883), 35 La. Ann. 1121.

63 See Wilson v. Fitchter (1885), 11 N. J. Eq. 71; New v. Wright, *supra.*

64 See McGowan Co. v. McGowan (1872), 22 Ohio St. 370; Wilkinson v. Tilden (1881), 9 Fed. 683; Roberts v. McKee (1859), 29 Ga. 161; Shannon v. Wright (1883), 60 Md. 520, Mechem's Cas. 317, Gilm. Cas. 481; Fletcher v. Vandusen (1879), 52 Iowa 448.

3. *Of Accounting and Dissolution.*

§ 227. In what cases granted—Accounting without a dissolution.—The most common ground for appealing to a court of equity is to secure an accounting to determine the interests of partners and creditors, to adjust mutual claims and demands, and to obtain a decree for payment and distribution. In such cases, as has been seen, the remedy at law is usually inadequate. The jurisdiction of a court of equity for these purposes is ample and its power to enforce its decrees complete.[65] Its aid, however, must be sought before the claim has become stale, and the complainant's laches may bar relief.[66]

A demand for an accounting is usually coupled with a demand for dissolution, and because it not only encourages dissension and discontent among the partners to order frequent accounting, but also because it is ordinarily futile to order an accounting of a going business whose daily fluctuations may unsettle the account before it is concluded, it was formerly the rule that an accounting would not be granted where it would not be complete and final or unless it was coupled with a dissolution.[67] The modern authorities have relaxed this rule to some extent, and there are cases in which an accounting alone may be granted. The most important of these, according to Mr. Justice Lindley,[68] are three: 1. Where one partner has sought to withhold from his copartner the profit arising from some secret transaction. 2. Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner or to drive him to a dissolution.[69] 3. Where the partnership has

[65] See Bracken v. Kennedy (1842), 4 Ill. 558, Gilm. Cas. 470; Clark v. Gridley (1871), 41 Cal. 119; Denver v. Roane (1878), 99 U. S. 355, 25 L. ed. 476; Bruns v. Heise (1905), 101 Md. 163, 60 Atl. 604.

[66] See Bell v. Hudson (1887), 73 Cal. 285, 14 Pac. 791, 2 Am. St. R. 791, and note (here the action was not brought until 25 years after the partner's death). Compare Morrill v. Weeks (1899), 70 N. H. 178, 46 Atl. 32, where the court said that delay for a period less than that fixed by a statute of limitations would not bar relief.

[67] See the elaborate discussion in Lord v. Hull (1904), 178 N. Y. 9, 70 N. E. 69, 102 Am. St. R. 484, Mechem's Cas. 920, Gilm. Cas. 472.

[68] Lindley on Partnership (7th ed.) 537.

[69] See Fairthorne v. Weston

proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all. To these may be added (1) under some circumstances doubtless, the case where the partnership agreements provide for periodical accountings, and (2) the case of accountings as to distinct transactions.[70]

§ 228. —— In these cases, however, an accounting will not, except in pursuance of partnership agreements, be granted of an isolated portion of what has been dealt with as a complete and general whole.[71] Moreover, "a court of equity will not take cognizance of an action for an accounting as a mere incident to the settlement of a solitary matter in dispute between partners, when it is not vital to either party or to the business, and a dissolution is not sought."[72]

The effect of the illegality of the transaction in an action for accounting has already been referred to.[73]

The Uniform Partnership Act[74] gives the right to a "formal account" to any partner where he is wrongfully excluded from the partnership business or property by his copartners; where the right exists under the terms of any agreement; where his copartner may be charged as a trustee of profits or property; and "whenever other circumstances render it just and reasonable."

§ 229. —— Nature of remedy by accounting—What included.—It is important to observe that this equitable action for an accounting, is not merely a process for calling one partner to account for something which he has received or had, or

(1844), 3 Hare 387, which is the case upon which this proposition of Justice Lindley was based. See, also, cases of accounting at the suit of excluded partners: McCabe v. Sinclair (1904), 66 N. J. Eq. 24, 58 Atl. 412; Sanger v. French (1898), 157 N. Y. 213, 51 N. E. 979; Reilly v. Woolbert (1916), 196 Ala. 191, 72 So. 10.

70 See Patterson v. Ware (1846), 10 Ala. 444.

71 See Davis v. Davis (1882), 60 Miss. 615.

72 Lord v. Hull, *supra*.

73 See *ante*, § 46. See, also, Pfeuffer v. Maltby (1881), 54 Tex. 454, 38 Am. Rep. 631; Pennington v. Todd (1890), 47 N. J. Eq. 569, 21 Atl. R. 297, 24 Am. St. R. 419.

74 Sec. 22.

to render an account; it is an action for adjustment, for contribution to losses, for settlement of affairs, and the like, and may result in a decree against a partner to pay something even though he had never received anything on account of the partnership.[75]

Its use to compel an accounting by a partner for money or property received by him, on alleged partnership account, is, however, doubtless the most common. Familiar instances are demands for secret profits,[76] for the profits of competing undertakings,[77] to compel the recognition of a partnership interest in property bought or acquired,[78] to compel an adjustment for partnership property, money or credits taken or disposed of by a partner,[79] and the like. So, a partner wrongly excluded by his copartner before or on dissolution, may avail himself of this remedy to secure a recognition of his rights and compensation for what has been appropriated.[80] It is also, as has been seen,[81] usually the remedy available against a partner for breaches of duty and violations of partnership agreements, from which the partnership, as distinct from a particular partner, is the sufferer.[82]

[75] See Spear v. Newell (1841), 13 Vt. 288, Mechem's Cas. 311.

[76] See Hodge v. Twitchell (1885), 33 Minn. 389, 23 N. W. 547, Mechem's Cas. 862; Mitchell v. Reed (1874), 61 N. Y. 123, 19 Am. Rep. 252, Mechem's Cas. 864; Tebbetts v. Dearborn (1883), 74 Me. 392, Mechem's Cas. 871; Jones v. Dexter (1881), 130 Mass. 380, 30 Am. Rep. 459, Mechem's Cas. 873; Bloom v. Lofgren (1896), 64 Minn. 1, 65 N. W. 960, Burd. Cas. 501.

[77] See Latta v. Kilbourn (1893), 150 U. S. 524, 37 L. ed. 1169, Mechem's Cas. 260, Burd. Cas. 503.

[78] See Metcalfe v. Bradshaw (1893), 145 Ill. 124, 33 N. E. 1116, 36 Am. St. R. 478, Mechem's Cas. 875.

[79] See Folsom v. Marlette (1897), 23 Nev. 459, 49 Pac. 39, Gilm. Cas. 486.

[80] See Pirtle v. Penn (1835), 3 Dana (Ky.) 247, 28 Am. Dec. 70, Mechem's Cas. 313, Gilm. Cas. 480; Moore v. Rawson (1904), 185 Mass. 264, 70 N. E. 64, Mechem's Cas. 1089, 199 Mass. 493, 85 N. E. 586; Karrick v. Hannaman (1897), 168 U. S. 328, 42 L. ed. 484, 18 Sup. Ct. 135; Pearce v. Ham (1885), 113 U. S. 585, 28 L. ed. 1067, 5 Sup. Ct. 676.

[81] See *ante*, § 214.

[82] See Miller v. Freeman (1900), 111 Ga. 654, 36 S. E. 961, 51 L. R. A. 504, Mechem's Cas. 894; Childers v. Neely (1899), 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468.

§ 230. Who may demand accounting.—The application for the accounting may be made by a partner or one who stands in the right of a partner (actions between partners being the only subject involved in this chapter); by the personal representative of a deceased partner; by the assignee or purchaser of the interest of a partner; by the purchaser of a partner's share upon a sale on execution; but not usually by a general creditor.[83]

4. *Of Receivers.*

§ 231. When will be appointed.—Receivers are frequently appointed in the settlement of partnership affairs, though the appointment is not a matter of course and will not be made unless good grounds exist for it. Since a receivership usually ousts the partners of their possession, involves additional expense, and commits the management to a stranger, courts feel a reluctance to appoint one. A receiver will not usually be appointed except upon dissolution; but the appointment may be made before, if a dissolution is inevitable, or if the partnership is insolvent and the assets are being wasted or improperly applied; but mere dispute or ill-feeling among the partners is not a sufficient ground.[84] It may be made also where one partner is insolvent and is wasting the assets or breaking up the business.[85] So, "wilful acts of fraud by the defendant, such as misappropriation of firm funds, making false and improper entries upon the firm books, depriving complainant of access to the books, and concealing from him the true condition of the business, afford sufficient ground for appointing a receiver."[86]

[83] See Bentley v. Harris (1873), 10 R. I. 434, 14 Am. Rep. 695; Freeman v. Freeman (1884), 136 Mass. 260; Gerard v. Bates (1888), 124 Ill. 150, 7 Am. St. Rep. 350, 16 N. E. 258; Channon v. Stewart (1882), 103 Ill. 541.

Under the Uniform Partnership Act, see §§ 22 and 27.

[84] See New v. Wright (1870), 44 Miss. 202, Mechem's Cas. 319; Allen v. Hawley (1855), 6 Fla. 142, 63 Am. Dec. 198; Heflebower v. Buck (1885), 64 Md. 15.

[85] See Shannon v. Wright (1883), 60 Md. 520, Mechem's Cas. 317, Gilm. Cas. 481; Phillips v. Trezevant (1872), 67 N. Car. 370; Sutro v. Wagner (1873), 23 N. J. Eq. 388, Gilm. Cas. 483; Barnes v. Jones (1883), 91 Ind. 161.

[86] High on Receivers (3d ed.), § 483.

A receiver may be appointed to supersede a surviving partner or a sole managing partner if he is acting wrongfully or misusing or misapplying the assets.[87] One of the partners may be appointed receiver if he is otherwise a suitable person.

The occasion for the appointment of a receiver usually arises in actions between the partners themselves or their representatives. The mere general creditors of the partnership or of a partner have rarely any standing to apply for a receivership over the partnership property, unless a statute provides for it.

§ 232. Powers and duties of receiver.—The receiver is an officer of the court and acts under its direction. He may be authorized to continue the business long enough to permit its being wound up without sacrifice. He has not, ordinarily, in the absence of a statute or an assignment, the *title* to the property,[88] but he has the right of possession and disposition, and should be given control of all of the assets of the firm. By the weight of authority, probably, the receiver has no inherent authority to sue in his own name to collect the debts or recover the property of the firm [89] and he cannot usually be sued upon the firm debts without the consent of the court, nor can creditors of the firm levy upon the property in his possession.[90]

"The appointment of the receiver does not absolve the co-

87 See Word v. Word (1889), 90 Ala. 81, 7 So. 412.

88 The ordinary receiver of partnership property, appointed by courts of equity, has ordinarily no title to the property, unless there has been an assignment of it made to him or unless there is some valid statute so providing. (The case of insolvent corporations is usually different.) See Heffron v. Gage (1894), 149 Ill. 182, 36 N. E. 569; Harrison v. Warren Co. (1903), 183 Mass. 123, 66 N. E. 589; Stokes v. Hoffman House (1901), 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870; Singerly v. Fox (1874), 75 Pa. 112; Murtey v. Allen (1899), 71 Vt. 377, 45 Atl. 752, 76 Am. St. R. 779. Some courts, however, regard him as in effect an assignee. See Wilkinson v. Rutherford (1887), 49 N. J. L. 241, 8 Atl. 507.

89 Garver v. Kent (1880), 70 Ind. 428; Wilson v. Welch (1892), 157 Mass. 77, 31 N. E. 712; Battle v. Davis (1872), 66 N. Car. 252; Yeager v. Wallace (1863), 44 Pa. 294. But compare Wilkinson v. Rutherford *supra;* Baker v. Cooper (1869), 57 Me. 388; Henning v. Raymond (1886), 35 Minn. 303, 29 N. W. 132.

90 See Jackson v. Lahee (1886), 114 Ill. 287, 2 N. E. 172.

partners from their partnership debts, nor stay or prevent actions against the members of the copartnership for the recovery of such debts. Judgments so obtained cannot, however, be enforced by execution levied on the assets in the hands of the receiver, for they are in *custodia legis*, but may share in the assets upon a proper application to the court." [91]

5. *Action by One Partnership Against Another Having Common Partners.*

§ 233. Jurisdiction of equity.—As has been seen in an earlier section,[92] it is commonly held that no action at law can be maintained by one partnership against another where the two have one or more partners in common. The forum for such cases is said to be in equity. This is because of the difficulty as to the common partner being both plaintiff and defendant at law—a difficulty which equity is able to avoid. As has also been seen,[93] it has been held in some of the States having the so-called "code" procedure that this result can be reached in such States under the "civil action." It has been denied that even equity would entertain the action, unless there was to be an accounting between the partners in the respective partnerships as well as the adjudication of the claim of the one partnership against the other.[94] This would not be necessary if the two firms had already settled an account between themselves.[95] Some courts have held that the action in equity can be maintained without an accounting between the partners, at least unless some showing is made that it would be inequitable to do so.[96] Judge

91 Bogert v. Turner (1909), 135 N. Y. App. Div. 530, 120 N. Y. S. 420.

92 *Ante*, § 219.

93 *Ante*, § 220.

94 See 5 American Law Review 47; Dixon, Partn. 268; Rogers v. Rogers (1847), 40 N. Car. 31.

95 See Calvit v. Markham (1839), 4 Miss. (3 How.) 343.

96 See Burrows v. Leech (1898), 116 Mich. 32, 74 N. W. 296; *Re* Buckhouse (1874), 2 Low. 331, Ames' Cas. 446. See, also, Haven v. Wakefield (1866), 39 Ill. 509; Crosby v. Timolat (1892), 50 Minn. 171, 52 N. W. 526, Gilm. Cas. 469; Noyes v. Ostrom (1910), 113 Minn. 111, 129 N. W. 142; Gibson v. Ohio Farina Co. (1859), 2 Disney (Ohio) 499, 13 Ohio Dec. 306.

Story said, many years ago,[97] that "Courts of equity in all such cases look behind the form of the transactions to their substance, and treat the different firms for the purposes of substantial justice exactly as if they were composed of strangers, or were in fact corporate companies."

[97] Story's Eq. Jur. (13th ed.), § 680; (14th ed.), § 923.

CHAPTER X.

OF THE AUTHORITY OF PARTNERS.

§ 234. In general.—The creation of partnership, as has been seen, creates a relation of agency between the partners, each partner being at once principal of and agent for the others. Those who adopt the separate entity theory of the partnership regard each partner as agent for the firm, as such an entity, rather than as principal for himself and agent for the others. Many of those who do not regard the partnership as a distinct entity constantly think of all of the partners collectively as being the principals of each partner as an agent. The results, however, are not materially different, and it is sufficient for the present purpose to say that the authority of each partner to bind his partners as well as himself—or to bind the firm—rests substantially upon the general principles of agency.

It will be evident that the authority of the partner-agent to bind his principal, *i. e.*, his partners or the firm, presents the same two aspects that have been discovered in the law of agency, namely:

(1) The authority as between the partners themselves, and

(2) The authority as between the firm and third persons.

I. Authority as Between the Partners Themselves.

§ 235. As between themselves, partners may fix authority by agreement.—It has been seen that, between the agent and the principal, the authority of the agent may be fixed by their agreement, and that, as between these parties, the agreement so made is usually conclusive, even though, as between the principal and third persons, the principal may be held liable for the agent's exercise of a more extended authority. The same rule applies here. The partners may by their own agreement determine the authority which shall be exercised by each partner, and between themselves this agreement, unless expanded or waived, will be conclusive. It will also ordinarily be conclusive as respects third persons who have notice of the agreement;[1] but

[1] Third persons bound by limitations upon a partner's authority imposed by the partnership agreement, when brought to their notice: Radcliffe v. Varner (1875), 55 Ga. 427; Knox v. Buffington (1879), 50 Iowa 320; Sladen v. Lance (1909), 151 N. Car. 492, 66 S. E. 449. Information sufficient to put a reasonably prudent and cautious man upon an in-

secret limitations upon the usual powers of a partner can be no more conclusive upon third persons who have no notice of them than are secret limitations upon the usual authority of an agent.[2] The result may be, therefore, as in the case of agency, that a partner may, by exceeding secret limitations but acting within the usual authority, bind the firm to third persons, and, at the same time, make himself liable to his partners for the loss they may sustain by reason of his act.[3]

§ 236. If no authority agreed upon, usual authority implied.—If, however, the partners have not expressly agreed upon the authority that shall be exercised by each, then they must be taken as having impliedly agreed that the usual and ordinary powers of partners in similar cases may be exercised. In this event, the question as between the partners will be substantially the same as between the firm and third persons, and the question then arises, What are the usual or the implied powers of a partner? As this question is, therefore, in the ordinary case to be answered in substantially the same way between whatever parties it may arise, we will consider it, for both purposes, under the head of the implied authority of partners as respects third persons.

It is, of course, true that as between the partners themselves estoppels may operate as well as in the case of third persons, but that question need not now be considered.

quiry which would have disclosed the facts, is held enough: Baxter v. Rollins (1894), 90 Iowa 217, 57 N. W. 838, 48 Am. St. R. 432; Bromley v. Elliot (1859), 38 N. H. 287, 75 Am. Dec. 182. This is usually a question of fact under all the circumstances: International Trust Co. v. Wilson (1894), 161 Mass. 80, 36 N. E. 589, Burd. Cas. 361. So, also, the Uniform Partnership Act, Sec. 9: "(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction."

[2] See Rice v. Jackson (1895), 171 Pa. 89, 32 Atl. 1036; Moore v. May (1903), 117 Wis. 192, 94 N. W. 45; Winship v. Bank of U. S. (1831), 5 Pet. (U. S.) 552, 8 L. ed. 216, Gilm. Cas. 356.

[3] See Leavitt v. Peck (1819), 3 Conn. 125, 8 Am. Dec. 157, Mechem's Cas. 375; Stone v. Wendover (1876), 2 Mo. App. 247; Vance v. Blair (1849), 18 Ohio 532, 51 Am. Dec. 467.

II. AUTHORITY AS BETWEEN THE FIRM AND THIRD PERSONS.

§ 237. Of what matters third persons must take notice.—It was found in the law of Agency that third persons would not be justified in proceeding blindly upon the assumption that an agent really possessed every authority which he might undertake to exercise; but that they must investigate his authority and act in good faith and with reasonable prudence. The same principle applies here. Persons dealing with a partner as such are bound to determine the existence of the partnership and to take heed of all limitations of which the nature and extent of the business may give notice, as well as of those restrictions which are actually brought to their notice or knowledge.

§ 238. —— Continued existence of partnership relation.—Many important questions may arise here as to the continued existence of the partnership relation, either generally or in respect of this alleged partner only.[4] Has the partnership been dissolved by events which so operate, and without the necessity of formal notice? Has it been otherwise dissolved, and has proper notice been given? Has this particular partner alone retired, or been expelled, or has his interest been seized or assigned? If the partnership has been dissolved, is what the partner in question proposes to do an act that he may properly do in closing up the business, or is he attempting to continue it? These and similar questions are more fully considered in later chapters on Dissolution and Notice.[5]

§ 239. —— Evidence of an adverse interest.—All persons dealing with a partner are, moreover, charged with notice of the principle applicable to all cases of delegated authority, name-

4 As will be seen, actual dissolution of the partnership usually works an important change in the authority of a partner. A single partner's relation may be *completely* changed or it may be in the *process* of change. A completed sale of his interest, for example, may have a very different effect, upon his present authority, from a mere mortgage of it which has not yet been foreclosed. See Monroe v. Hamilton (1877), 60 Ala. 226, Burd. Cas. 306.

5 See *post*, Chapters XV, XVI.

ly, that the authority presumptively is to be exercised for the benefit of the principal and not of the agent himself; and persons who deal with a partner with notice that he is abusing his authority or is using the property, credit or responsibility of the partnership for his own private purposes, as, for example, to pay his own individual debts, can not hold against the other partners unless they can show the consent of the other partners to such dealing, or can estop such other partners from asserting their rights.[6] The same result would follow where, though the partner acting was not personally to gain by the transaction, his act would be an obvious fraud upon his copartner, as where, for example, he proposes to give away the partnership property or use its credit where it had no interest and could receive no benefit.

§ 240. Nature and extent of business to be observed.—The nature and scope of the business are constantly to be regarded. It may be limited to a single venture or transaction, and in such a case limitations similar to those imposed by a special agency must be observed. It may be confined to a single line of busi-

[6] This requirement demands more than mere good faith or payment of consideration, on the part of the transferee. One who buys property, not negotiable, from another can ordinarily acquire no better title than his transferer was actually authorized to transfer, notwithstanding possession, good faith, or the payment of value, unless he can raise an estoppel,—unless he can show that he was fairly led to part with his money in reliance upon some conduct of the true owner which was reasonably calculated to make him believe that the transfer was authorized. Compare Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776, Burd. Cas. 215, with Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631. See, also, Columbia Nat. Bank v. Rice (1896), 48 Neb. 428, 67 N. W. 165, Burd. Cas. 309. See more fully *post*, §§ 274, 275.

And even where the partner transfers a negotiable thing, like the firm's own note or a note held by it, the first transferee often cannot fail to see that the partner is apparently abusing his authority, *e. g.*, where he is using obviously partnership credits to pay his individual debts, and such transferee cannot hold or recover, though he may have the *power*, in many cases, under the law of negotiable instruments, to transfer to a *bona fide* purchaser who can hold or recover. See Nichols v. Thomas (1915), 51 Okla. 212, 151 Pac. 847, L. R. A. 1916 B 908.

ness, and in such a case the implied authority must be limited by the usages of that business, unless the partners have, by their words or conduct, given it a wider scope. It may be a business of a particular kind, as in the case of a professional partnership, in respect of which the law recognizes but limited powers. Of all such facts third persons must take notice, and must be bound by the legal conclusions to be drawn from them.[7]

Provisions in the partnership articles, however, which would limit the usual and ordinary authority of a partner in such a partnership or in this one as actually and openly carried on, would not ordinarily affect a third person who was ignorant of them.[8]

§ 241. Same subject—Distinction between trading and non-trading firms.—Perhaps the most important distinction to be observed as to the nature of the partnership business is that drawn between trading and non-trading partnerships, or, as it is sometimes put, between commercial and non-commercial partnerships. "The test of the character of the partnership," it is said in one case, "is buying and selling. If it buys and sells, it is commercial or trading. If it does not buy or sell, it is one of employment or occupation."[9] By this is meant, of course,

[7] Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from circumstances connected with the business of the firm. Livingston v. Roosevelt (1809), 4 Johns. (N. Y.) 251, 4 Am. Dec. 273, 1 Am. Lead. Cas., p. 507 and note. Persons dealing with partners are bound by the agreement between the partners themselves if such persons, at the time of the dealing, knew the nature of such agreement, or had knowledge of such facts and circumstances relating thereto as would lead a man of common prudence to make inquiry about them. Bromley v. Elliot (1859), 38 N. H. 287, 75 Am. Dec. 182. To same effect: Baxter v. Rollins (1894), 90 Iowa 217, 57 N. W. 838. See, also, Wilson v. Richards (1881), 28 Minn. 337, 9 N. W. 872; Cargill v. Corby (1852), 15 Mo. 425; Peterson v. Armstrong (1901), 24 Utah 96, 66 Pac. 767; Iroquois Rubber Co. v. Griffin (1919), 226 N. Y. 297, 123 N. E. 369.

[8] See Winship v. Bank of U. S. (1831), 5 Pet. (U. S.) 529, 8 L. ed. 216, Gilm. Cas. 356.

[9] See Lee v. First National Bank (1890), 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; Winship v. Bank of United States (1831), 5 Peters (U.

buying and selling as a business, and not as a mere incident to some other business or occupation.[10] While it must be confessed that this test does not always seem to be a very happy one, or one easy of application, the distinction itself is usually an important one. As can readily be seen, and as will be more fully observed hereafter, much greater powers, of a commercial character at least, may properly be regarded as incident to a commercial or trading business than to one for the exercise of a profession or occupation merely. Of this distinction and its legal consequences third persons are bound to take notice.

In dealing with this question in another case,[11] the court,

S.) 529, Gilm. Cas. 356; Dowling v. Exchange Bank (1892), 145 U. S. 512, 12 Sup. Ct. 928, 36 L. ed. 795, Mechem's Cas. 356; Pease v. Cole (1885), 53 Conn. 32, 22 Atl. 681, 55 Am. Rep. 53, Mechem's Cas. 344, Burd. Cas. 314, Gilm. Cas. 372; Smith v. Sloan (1875), 37 Wis. 285, 19 Am. Rep. 757; Phillips v. Stanzell (1895), 28 S. W. (Tex.) 900, Mechem's Cas. 944, Burd. Cas. 323; Randall v. Merideth (1890), 76 Tex. 669, 13 S. W. 576; Marsh v. Wheeler (1904), 77 Conn. 449, 59 Atl. 410, 107 Am. St. R. 40; Vetsch v. Neiss (1896), 66 Minn. 459, 69 N. W. 315, Burd. Cas. 328, Gilm. Cas. 379; Higgins v. Beauchamp [1914], 3 K. B. 1192; Schumacher v. Sumner Telephone Co. (1913), 161 Iowa 326, 142 N. W. 1034, Ann. Cas. 1916 A 201; First Nat. Bank v. Farson (1919), 226 N. Y. 218, 123 N. E. 490.

The so-called mining-partnership, recognized in several states, is a non-trading partnership: Childers v. Neely (1899), 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. R. 777, Mechem's Cas. 34; Congdon v. Olds (1896), 18 Mont. 487, 46 Pac. 261, Burd. Cas. 331. For other illustrations see *post*, §§ 255-257.

10 Thus in Randall v. Merideth, *supra*, the court quotes with approval the definition of Bates, Partn. § 327, which emphasises this point: "If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise it is not." Marsh v. Wheeler, *supra*, to some extent seems contrary to this. It is there said that those partnerships are trading "whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which in their character and incidents are like those of traders generally." Partnerships for a single enterprise, often called "joint ventures," (*ante*, §§ 16, 43), would usually be non-trading.

11 Woodruff v. Scaife (1887), 83 Ala. 152, 3 So. 311.

speaking of a farming partnership, said: "The partnership in this case is not a trading or commercial one, which is generally governed as to its scope of authority by the rules of the law-merchant, of which the courts take judicial cognizance. The principle governing a non-trading partnership is well settled. There are three classes of cases where each partner connected with such associations may lawfully bind the firm; the burden, in each case, being on the plaintiff to prove the facts by which such authority is established, or from which it may be implied: (1) Where he has express authority to do so; (2) where the contract made, or thing done, is necessary in order to carry on the business of the partnership; and (3) where it is usually or customarily incident to other partnerships of like nature."

The Uniform Partnership Act is silent as to this distinction.

§ 242. Same subject—The power of a partner to impose restrictions by dissent.—The limitations upon the implied authority of one partner may also be increased in certain cases by his copartner's refusal to be bound by his contemplated acts. One partner cannot by secret dissent impose limitations upon his partner's authority to bind the firm to third persons; [12] neither can one partner by an open and communicated dissent, without a dissolution, deprive his partner of those powers which the partnership articles confer upon him,[13] or of those whose exercise is essential to the continuance of the business,[14] or, with or without a dissolution, of those essential to the protection of the partner against the debts,[15] nor can he by such dissent im-

12 This is, of course, in accordance with the rule requiring notice of revocation of authority, and the like.

13 One may revoke an authority or dissolve a partnership in many cases, but one party alone can not revoke a contract.

14 Thus in Wipperman v. Stacy (1891), 80 Wis. 345, 50 N. W. 336, Mechem's Cas. 376, one partner had, by the contract, the power to make all the purchases but of parties named by the other partner. The latter gave personal and public notices forbidding "all and every-one" from selling to his partner "anything of any kind or nature." Was this effectual; was it in substance a dissolution; or was it merely a futile and inconsistent attempt to strip the partnership of all of its significance without dissolving it? The court held it to be the latter.

15 Partnership, as to the authority

pose upon third persons whose rights are already fixed additional burdens or responsibilities, as, for example, to take away a debtor's right to pay to either partner; [16] but as to the future exercise of the ordinary incidental and implied powers affecting only the manner in which the business is to be carried on,—the making of this or that new contract, the incurring of this or that new obligation, one of two partners may, it is held, by giving notice to third persons, escape being bound by the contemplated act of his partner.[17]

§ 243. —— If this rule be sound, it must, it is thought, be upon the theory that where there are but two partners—and therefore no majority is possible—and where there is no express agreement about the matter, it is the implied understanding that all of the ordinary incidental details of the business within its general scope shall be from time to time decided, if question arises, by *both,* since one can ordinarily have no *more* authority than the other. If then both do not agree, *i. e.,* if one dissents, that act shall not be done.

If there are more than two partners and therefore a majority view is possible, it may equally be thought that such matters

necessary for a partner's protection, *e. g.,* the power to apply the assets to the payment of debts, etc., exhibits one of that kind of authorities sometimes called a "power coupled with an interest," or a "power given by way of security."

Compare Fidelity Banking & Trust Co. v. Kangara Co. (1894), 95 Ga. 172, 22 S. E. 50.

16 See Noyes v. New Haven, etc., R. Co. (1861), 30 Conn. 1.

17 See Leavitt v. Peck (1819), 3 Conn. 125, 8 Am. Dec. 157, Mechem's Cas. 375; Monroe v. Conner (1838), 15 Me. 178, 32 Am. Dec. 148, Gilm. Cas. 393; Noyes v. New Haven R. R. Co. (1861), 30 Conn. 1; Dawson v. Elrod (1899), 105 Ky. 624, 49 S. W. 465, 88 Am. St. R. 320, 20 Ky. Law R. 1436, Mechem's Cas. 380; Bank v. Mason (1917), 139 Tenn. 659, 202 S. W. 931; Johnson v. Bernheim (1877), 76 N. C. 139; Johnston v. Dutton (1855), 27 Ala. 245; Ellis v. Allen (1886), 80 Ala. 515, 2 So. 676; Yeager v. Wallace (1868), 57 Pa. 365; Carr v. Hertz (1895), 54 N. J. Eq. 127, 33 Atl. 194, Burd. Cas. 356; Wipperman v. Stacy (1891), 80 Wis. 345, 50 N. W. 336, Mechem's Cas. 376; McCord v. Callaway (1899), 109 Ga. 796, 35 S. E. 171; Gallway v. Mathew (1808), 10 East 264. Compare First Nat. Bank v. Larson (1911), 146 Wis. 653, 132 N. W. 610, 12 Columbia Law Review 85.

of detail as are not expressly provided for have also been left to be decided as they arise, but here (in accordance with a common tradition applicable to the determination of details by a group agreed upon a general plan), by a majority. This point, however, will be more fully considered in a later section.[18]

§ 244. Of the partner as the agent of the partnership.—Applying these considerations, the general rule may be said to be that each partner is an agent—and, so far as such a distinction is material, a *general* rather than a *special* agent—with implied authority to bind the partners in all matters falling within the general and usual scope of the business as actually conducted; and that third persons dealing with one partner as such agent will be protected if they act in good faith, with reasonable prudence, and with no notice of any other limitations than those which the nature of the business as ostensibly carried on may afford. The Uniform Partnership Act is to the same effect.[19]

Greater authority may, of course, be conferred by the express or implied consent of the partners previously given, or by their subsequent ratification; but the rule stated refers to the authority to be implied from the nature of the business and the method of transacting it.

Special arrangements between the partners may also diminish the normal authority of a particular partner or partners, even to the point of extinction; but such arrangements, as has been

[18] See *post*, § 281.

[19] Sec. 9. "(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

In Pohlman v. Taylor (1874), 75 Ill. 629, it is said: "Every partner possesses full and absolute authority to bind all the partners by his acts or contracts, in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members."

seen, would not ordinarily be binding upon third persons having no notice or knowledge of them.[20]

§ 245. —— The Roman Law, as has been seen, did not recognize this agency of one partner to bind the others contractually by reason of the relationship.[21]

In the case of the so-called "joint venture," as distinguished from the commercial partnership, the authority of one associate to bind the others contractually as the mere result of the relation (as distinguished from the actual agreement, practice or appearance) is more doubtful.[22]

The merely nominal partner, not being an actual partner, would usually not be an agent at all. He may bind himself, of course. If he alone has held himself out as partner with others, he may not bind them. If they have assented to such holding out or if they have held him out as their partner, he may then bind them.[23]

20 See Rice v. Jackson (1895), 171 Pa. 89, 32 Atl. 1036, *ante*, § 235.

21 See *ante*, p. xxii, Introduction. In Hunter's Roman Law (3d ed.), p. 521, it is said: "The contract of partnership in Roman law dealt solely with the rights of partners as between themselves; and one of the partners had no implied power to bind the others, even in matters strictly within the business of the partnership. One of the partners might, indeed, to a qualified extent, be an agent for the others, but only in the same way as a stranger to the partnership. This peculiarity is to be attributed to the slow and imperfect development of agency in the creation of contracts." See, also, Roby, Roman Private Law, II, p. 248 *et seq.;* 132, *et seq.*

22 In Jones v. Gould (1913), 209 N. Y. 419, 103 N. E. 720, the court said: "This was not strictly a partnership, though it had many of the features of such a relation. Williams v. Gillies, 75 N. Y. 197. It was what is now generally known as a joint venture rather than a commercial partnership. The authorities in some of the states hold that in the prosecution of the venture each party has the same full power to bind his associates in any contract in regard to the venture that an ordinary commercial partner would have. We are not now inclined to hold that doctrine in its full integrity, but such a ruling is not necessary to the disposition of the case."

23 The Uniform Partnership Act, sec. 16, works this out with considerable fulness. See *ante*, § 244, also Appendix. The nominal partner or partner by estoppel is personally liable or liable jointly with those who consent to his representations. As an agent "he is an agent of the persons consenting to

§ 246. Partner has no implied authority outside of scope of business.—The first and most obvious limitation imposed by this rule is, that one partner can have no implied authority to bind the partnership to third persons in any matter outside of the scope of the business as ostensibly carried on.[24] Thus, as a few of many similar illustrations, it is not within the scope of the business of a firm of lumber manufacturers to subscribe for stock in a plank-road company; nor of a firm of millers, or planters and farmers, to carry on a grocery store; nor of an iron furnace partnership to buy a distillery; nor of a printing firm to undertake to sell pianos; nor of a firm of millers and grain dealers to speculate in futures; nor of a trading partnership to collect accounts for others, or buy land for speculation;[25] nor of a firm of lawyers to undertake to collect debts or foreclose mortgages without pay. Other illustrations will be given under special heads.

§ 247. What meant by scope.—What is meant by the *scope* of the business is not capable of exact definition, but, in general, it means the limits commonly and usually fixed to a similar business at that time and place, and reasonably and

such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act of the person acting and the persons consenting to the representation."

[24] Thus, also, the Uniform Partnership Act, sec. 9: "(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners."

[25] See Barnard v. Plank-road Co. (1859), 6 Mich. 274, Mechem's Cas. 334; Banner Tobacco Co. v. Jenison (1882), 48 Mich. 459, 12 N. W. 655, Mechem's Cas. 336; Irwin v. Williar (1883), 110 U. S. 499, 4 Sup. Ct. 160, 28 L. ed. 225, Gilm. Cas. 363; Boardman v. Adams (1857), 5 Iowa 224, Mechem's Partn. Cas. 339; Davis v. Dodson (1905), 95 Ga. 718, 22 S. E. 645, 51 Am. St. R. 108, 29 L. R. A. 496, Mechem's Cas. 942, Burd. Cas. 338; Humes v. O'Bryan (1883), 74 Ala. 64; Waller v. Keyes (1834), 6 Vt. 257; Pickels v. McPherson (1881), 59 Miss. 216; Brooks v. Hamilton (1821), 10 Mart. (La.) 283, 13 Am. Dec. 328.

generally necessary to enable that business to be carried on. The usages of those engaged in the same business at the same time and place are therefore material to be observed as indicating not only what the partners themselves but third persons must have contemplated as falling properly within its purpose. The previous practice and conduct of the particular firm may also be of weight as indicating what the partners have determined to be authorized. "Necessity" alone in a given case is not enough, nor is the fact that benefit may have resulted from the act; it must fall within the general and established usages of such a business, or at least within the usages of the particular business.

"Scope" is ordinarily a question of fact to be determined under proper instructions from the court, by the jury (or other triers of the facts) in view of the circumstances of the particular case;[26] but questions originally of fact may have become crystalized into rules of law, admitted or undisputed facts may demand a legal inference, or written agreements may require legal interpretation, and in such cases the court will decide. Mere questions of fact may also be decided by the court (by a directed verdict) where only one inference may reasonably be drawn from the evidence in the case.[27]

§ 248. Extending original scope by subsequent conduct.—The scope originally fixed by the partners for the conduct of their business may be subsequently enlarged with their consent. This consent may be given consciously and expressly, or it may be given, perhaps unconsciously, by acquiescence or implication. As the scope of the business is extended, the range of the implied authority of the partners extends accordingly.[28] As was

26 See Loudon Savings Society v. Savings Bank (1860), 36 Pa. St. 498, 78 Am. Dec. 390.

27 See Everitt v. Chapman (1827), 6 Conn. 347; Morgan v. Farrel (1890), 58 Conn. 413, 20 Atl. 614, 18 Am. St. R. 282, Mechem's Cas. 171; Stundon v. Dahlenberg (1914), 184 Mo. App. 381, 171 S. W. 37; Banner Tobacco Co. v. Jenison (1882), 48 Mich. 459, 12 N. W. 655.

28 See Boardman v. Adams (1857), 5 Iowa 224, Mechem's Cas. 339; Woodward v. Winship (1832), 12 Pick. (Mass.) 429.

In Eady v. Newton Coal & Lumber Co. (1905), 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650, with note, it is held that the original agreements may be extended by

said in one case[29] in which a firm of printers had gradually added piano selling to their business, "Where a partnership firm, embarked in a particular business to which their engagements are confined, and to which alone their partnership contracts extend, by mutual agreement enlarge the sphere of their operations and include another branch of business, the power of each partner to bind the firm by his contracts is co-extensive with the whole business of the partnership; and the acts of each member are as binding on the firm in the new branch of business in which they are engaged as they are in the former regular and ordinary business."

§ 249. Consideration of particular authorities.—It is obviously impossible to enumerate all of the powers which may or may not fall within the scope of a particular partnership; but the question of the existence of several has so frequently arisen that they may be grouped together as further illustrations of the subject. For convenience sake, the various subjects may be arranged in something of an alphabetical order. Thus—

§ 250. —— Admissions, representations and declarations.—In accordance with the ordinary rules of agency, the statements, representations and admissions of one partner are not admissible against another, unless he has in some way assented to them, either to prove the fact of the partnership, or to prove that a given transaction apparently beyond its scope was in fact a partnership transaction;[30] but if the existence of the part-

implication based upon the general usage of the firm acquiesced in by all of the partners; but before one partner who has not expressly agreed to the custom can be held to have acquiesced, it must appear that he knew of it and his acquiescence must indicate his consent to it as the regular course of dealing rather than as a departure from the established course in a special and isolated instance.

[29] Boardman v. Adams, *supra*.

[30] See Strong v. Smith (1892), 62 Conn. 39, 25 Atl. 395; Taft v. Church (1895), 162 Mass. 527, 39 N. E. 283; Heffron v. Hanaford (1879), 40 Mich. 305; Columbia Nat. Bank v. Rice (1896), 48 Neb. 428, 67 N. W. 165; First Nat. Bank v. Conway (1886), 67 Wis. 210, 30 N. W. 215. But where the act is one which he might apparently do either for the partnership or for himself or some third person, his statements or representations as to

nership has first been shown by other evidence, then the admissions, representations or declarations of one partner made during the continuance of the partnership, while engaged in the transaction of the partnership business and in reference to partnership affairs, are admissible against the others.[31] Such in substance is the rule of the Uniform Partnership Act.[32] One partner cannot, however, by his own self-serving admissions or declarations alone not acquiesced in by his copartners, deprive his partners of their interests in the firm property.[33]

Where it is desired to prove by one partner either the existence of the partnership or who were the partners composing it, he should be called as a witness. While his extrajudicial *admissions* are not admissible, his *testimony* on the trial is competent.[34]

Upon the termination of the partnership, the authority of each partner as an agent to carry on the business ordinarily ceases, and with it the authority to make statements, representations or admissions so far as that authority springs from the original authority to carry on the business; but, as will be seen hereafter,[35] a partner may, after dissolution, have an authority to act in closing up its affairs, and out of that fact, while he is so acting and with reference to such acts, an authority to make statements, representations or admissions may arise suitable to the occasion and limited by it.[36]

the one for whom he then purported to act would be competent. See Smith v. Collins (1874), 115 Mass. 388; Benninger v. Hess (1884), 41 Ohio St. 64; Clark v. Taylor (1880), 68 Ala. 453.

31 See Drumright v. Philpot (1854), 16 Ga. 424, 60 Am. Dec. 738; Burgan v. Lyell (1851), 2 Mich. 102, 55 Am. Dec. 53, Burd. Cas. 312, Gilm. Cas. 358; Griswold v. Haven (1862), 25 N. Y. 595, 82 Am. Dec. 380; Rapp v. Latham (1819), 2 B. & Ald. 795, Ames' Cas. 610, Burd. Cas. 341; Brundage v. Melton (1895), 5 N. Dak. 72, 63 N. W. 209, Burd. Cas. 348.

32 Sec. 11. "An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership."

33 Williams v. Lewis (1888), 115 Ind. 45, 17 N. E. 262, 7 Am. St. R. 403.

34 See First Nat. Bank v. Conway, *supra*.

35 See *post*, §§ 423-426.

36 See Pennoyer v. David (1860), 8 Mich. 407, Mechem's Cas. 543; Feigley v. Whitaker (1872), 22 Ohio St. 606, 10 Am. Rep. 778, Mechem's Cas. 550. Compare Mil-

§ 251. —— **Agents—Appointment of.**—Each partner has implied authority to employ on account of the firm such agents and servants as the proper transaction of the partnership business may require.[37] This is not a case of the delegation by one partner of his authority, but an employment in behalf of all the partners by the acting partner as the agent of all.

The firm may act as agent. It may be organized to act as agent; it may undertake the agency in question as a part of its regular business, or undertake it with the consent of all as a departure from or an addition to its regular business. Where the partners are appointed as individuals, all must ordinarily unite in executing the authority; but where the firm is the agent, any partner has ordinarily as much implied power to transact that business alone as he would have to transact alone any other piece of business in which the firm is engaged.[38]

§ 252. —— **Arbitration.**—By the weight of authority one partner has ordinarily no implied power to submit controverted partnership matters to arbitration.[39] The reason is that this is not the usual and ordinary method by which such affairs are adjusted. Proceedings in the regularly established courts is the ordinary method. This is the prevailing rule whether the agreement to submit is under seal or not, though in a few states an

ler v. Neimerick (1857), 19 Ill. 172, where it does not appear that the admission was made as part of any act of settlement on which the partner was engaged.

[37] See Burgan v. Lyell (1851), 2 Mich. 102, 55 Am. Dec. 53, Burd. Cas. 312, Gilm. Cas. 358; Mead v. Shepard (1867), 54 Barb. (N. Y.) 474; Sweeney v. Neely (1884), 53 Mich. 421; Harvey v. McAdams (1875), 32 Mich. 472; Carley v. Jenkins (1874), 46 Vt. 721; Reirden v. Stephenson (1914), 87 Vt. 430, 89 Atl. 465, Ann. Cas. 1916 C 109; Bartlett v. Powell (1878), 90 Ill. 331.

[38] See Deakin v. Underwood (1887), 37 Minn. 101, 33 N. W. 318, 5 Am. St. R. 827; Frost v. Erath Cattle Co. (1891), 81 Tex. 505, 17 S. W. 52, 26 Am. St. R. 831.

[39] See Fancher v. Furnace Co. (1886), 80 Ala. 481, 2 So. 268; Walker v. Bean (1886), 34 Minn. 427, 26 N. W. 232; Gay v. Waltman (1879), 89 Pa. St. 453; Davis v. Berger (1884), 54 Mich. 652, 20 N. W. 629; Hoffman v. Westlecraft (1914), 85 N. J. L. 484, 89 Atl. 1006; Tillinghast v. Gilmore (1871), 17 R. I. 413, 22 Atl. 942.

unsealed agreement by one partner has been held binding. The power may, of course, be conferred by the consent of the other partners, and would perhaps exist if the others have abandoned the business to his sole management and discretion.

The Uniform Partnership Act so provides.[40]

§ 253. —— Assignments for creditors.—Since such a proceeding ordinarily results in closing up the business rather than in carrying it on, and is an unusual and extraordinary act, it is settled by the weight of authority, as a general rule, that one partner has no implied power to make a general assignment of the partnership property for the benefit of partnership creditors; though it will be valid if the other partners previously consent, either expressly or impliedly, or subsequently ratify it. To this general rule one exception is usually made: that if the other partners have absconded or are absent so that they cannot be consulted, or are otherwise incapable of assenting or dissenting, then the remaining partner may make such an assignment without their consent, if there is a situation which seems fairly to render such a proceeding imperative or desirable and he acts in good faith in view of such an emergency.[41]

[40] Sec. 9. Subd. 3 (*e*) "Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to * * * submit a partnership claim or liability to arbitration or references."

[41] See Loeb v. Pierpoint (1882), 58 Iowa 469, 12 N. W. 544, 43 Am. Rep. 122; Shattuck v. Chandler (1889), 40 Kan. 516, 20 Pac. 225, 10 Am. St. R. 227, Mechem's Cas. 363, Gilm. Cas. 236; Sullivan v. Smith (1884), 15 Neb. 476, 19 N. W. 620, 48 Am. Rep. 354; Rumery v. McCulloch (1882), 54 Wis. 565, 12 N. W. 65; Coleman v. Darling (1886), 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253; Voshmik v. Urquhart (1895), 91 Wis. 513, 65 N. W. 60 (where other partner had absconded); Stein v. La Dow (1868), 13 Minn. 412; Williams v. Frost (1880), 27 Minn. 255, 6 N. W. 793; Hill v. Postley (1893), 90 Va. 200, 17 S. E. 946; Mayer v. Bernstein (1891), 69 Miss. 17, 12 So. 257; Deckard v. Case (1836), 5 Watts (Pa.) 22, 30 Am. Dec. 287, Gilm. Cas. 233 (other partner had absconded); Fox v. Curtis (1896), 176 Pa. 52, 34 Atl. 952; Clafflin v. Evans (1896), 55 Ohio St. 183, 45 N. E. 3, 60 Am. St. R. 686, Burd. Cas. 216; Steinhart v. Fykrie (1885), 5 Mont. 463, 6 Pac. 367; Johnson v. Robinson (1887), 68 Tex. 399, 4 S. W. 625; Bowen v. Clark (1856), 1 Biss.

The Uniform Partnership Act provides that "unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership."[42] Unless the phrase "have abandoned the business" is liberally construed, it doubtless limits the rule generally agreed upon, as above stated, in a number of situations.

An unauthorized assignment might be subsequently ratified by the other partners, but not, it is held, so as to cut off intervening rights.[43]

§ 254. —— **Attorneys—Employment of.**—Inasmuch as prosecuting and defending ordinary actions at law arising in the course of the business, obtaining necessary legal advice in reference to the conduct of the partnership affairs, and procuring proper legal assistance in the preparation of partnership contracts, leases, and the like, are common and familiar incidents of partnership business, the implied authority of one partner to employ, on account of the partnership, attorneys to perform such necessary and proper services cannot be doubted, so far as liability for such employment and its ordinary incidents is concerned.[44] As will be seen hereafter, however, one partner has usually no implied authority, either in person or through attorneys employed by him alone, to subject his copartners, not personally served with process or personally appearing, to the jurisdiction of a court in such wise as to enable a *personal* judgment or decree to be rendered against such copartners.[45]

(U. S. D. C.) 128 (other partner within reach by telegraph); Hook v. Stone (1864), 34 Mo. 329 (denying authority though other partner absent); Wilcox v. Jackson (1884), 7 Colo. 521, 4 Pac. 966; Carrie v. Cloverdale Co. (1891), 90 Cal. 84, 27 Pac. 58 (temporary absence not abandonment).

42 Sec. 9, subd. 3 (*a*).

43 See Coleman v. Darling, *supra*.

44 See Bennett v. Stickney (1845), 17 Vt. 531; Wheatley v. Tutt (1867), 4 Kan. 240; Charles v. Eshleman (1879), 5 Col. 107 (not in the case of a mining partnership).

45 See *post*, §§ 262, 276. One partner has no implied authority to enter an appearance in a suit, except for the partnership, and his appearance will therefore not per-

§ 255. —— **Bills and notes.**—Authority to execute negotiable instruments is one so capable of easy and costly abuse that it is reluctantly implied in the case of all agents and representatives. Usually there must be express authority, great necessity, or an established usage in that or similar enterprises. In the case of partnerships the implied authority of one partner to bind the firm upon negotiable paper is usually made to depend largely upon the trading or non-trading character of the firm. This is one of the cases in which the ordinary usages of commercial firms have become crystalized into a rule of law. There come also into operation the peculiar rules respecting the rights of the *bona fide* purchaser of negotiable paper.

§ 256. —— **1. In the case of a trading firm,** each partner has implied authority to bind the partnership by making, accepting or indorsing, in its name, and in the course of its business, a bill or note for partnership purposes; and negotiable paper executed in the firm name by one partner in a trading firm will, *prima facie,* be presumed to bind the firm. But if the bill or note was not for partnership purposes, but was really in fraud of the firm—as if it were given, without the other partners' consent, for the individual debt or purposes of one partner,—it would not bind the firm in the hands of the original payee or of any other person who had notice of this fact, or who did not pay value for it. In the hands of a *bona fide* holder for value without notice, however, it would be binding upon the partners, and the latter would have recourse against the partner giving it. The original payee of paper given for the individual debt of the partner (who of course practically always has notice of that fact), or any other holder having notice of that fact, can only recover of the firm by showing affirmatively that the other partners previously authorized or subsequently ratified its execution.[46]

sonally bind another partner not within the jurisdiction and not served with process: Phelps v. Brewer (1852), 9 Cush. (Mass.) 390, 57 Am. Dec. 56. After dissolution one partner has no implied authority to cause the appearance of another partner to be entered in an action against the firm: Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271.

46 See Redlon v. Churchill (1882),

§ 257. ——2. **In the case of a non-trading firm,** however, one partner has, by the weight of authority, no implied authority to bind the partnership by making, accepting or indorsing negotiable paper, even though, in fact, done in the course of partnership business and for its benefit. In such partnerships the authority to make negotiable paper can only exist by virtue of the consent of the partners, the necessity of the case, or usage in that or similar firms.[47] Paper not so made is there-

73 Me. 146, 40 Am. Rep. 345; Mechanics' Ins. Co. v. Richardson (1881), 33 La. Ann. 1308, 39 Am. Rep. 290; Sherwood v. Snow (1877), 46 Iowa 481, 26 Am. Rep. 155; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607; Walsh v. Lennon (1881), 98 Ill. 27, 38 Am. Rep. 75; Feurt v. Brown (1886), 23 Mo. App. 332; Buettner v. Steinbrecher (1895), 91 Iowa 588, 60 N. W. 177, Burd. Cas. 326; Noyes v. Crandall (1895), 6 S. Dak. 460, 61 N. W. 806, Burd. Cas. 335. Of the trading or commercial sort, in this connection, the following partnerships have been held to be: stock-brokerage, including buying and selling of stocks, Nemeth v. Tracy (1913), 158 N. Y. App. Div. 497, 144 N. Y. Sup. 901; banking, including buying, selling, discounting and re-discounting commercial paper, McNeal v. Gossard (1897), 6 Okla. 363, 50 Pac. 159; First Nat. Bank v. Farson (1919), 226 N. Y. 218, 123 N. E. 490; manufacturing and selling goods, implements, machinery, etc., Winship v. Bank of United States (1831), 5 Peters (30 U. S.) 29, 8 L. ed. 216; Holt v. Simmons (1884), 16 Mo. App. 97; Hoskinson v. Eliot (1869), 62 Pa. 393; Phipps v. Little (1913), 213 Mass. 414, 100 N. E. 615; plumbing contracting, involving large purchases of plumbing fixtures and fittings to be installed in the work contracted for, Marsh v. Wheeler (1904), 77 Conn. 449, 59 Atl. 410, 107 Am. St. R. 40; and of course, those engaged in buying and selling merchandise, lumber, cattle, seeds, etc., Walsh v. Lennon, *supra;* Smith v. Collins (1874), 115 Mass. 388; Dow v. Moore (1867), 47 N. H. 419; Wagner v. Simmons (1878), 61 Ala. 143; First Nat. Bank v. Webster (1915), 130 Minn. 277, 153 N. W. 736; Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co. (1909), 92 Ark. 271, 122 S. W. 658; drug-store, Lindh v. Crowley (1883), 29 Kan. 756; saloon, Phillips v. Stanzell (1895), 28 S. W. (Tex.) 900, Mechem's Cas. 944, Burd. Cas. 323.

47 See Pease v. Cole (1885), 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681, Mechem's Partn. Cas. 344, Burd. Cas. 314, Gilm. Cas. 372; Phillips v. Stanzell (Tex. 1895), 28 S. W. 900, Mechem's Cas. 944; Burd. Cas. 323; Dowling v. Exchange Bank (1892), 145 U. S. 512, 12 Sup. Ct. 928, 36 L. ed. 795, Mechem's Cas. 356; Smith v. Sloan (1875), 37 Wis. 285, 19 Am. Rep. 757; Pooley v. Whitmore (1873), 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733, Gilm. Cas. 360; Judge v. Braswell (1875), 13 Bush (Ky.), 67,

fore unenforceable not only in the hands of the original payee, but also of a *bona fide* holder for value, because the nature of the business is notice to every one of the limited powers of the partners. *A fortiori* could neither the original payee nor a

26 Am. Rep. 185; Lee v. First National Bank (1890), 45 Kan. 8, 25 Pac. 196, 11 L. R. A. 238; Levi v. Latham (1884), 15 Neb. 509, 48 Am. Rep. 361; Friend v. Duryee (1879), 17 Fla. 111, 35 Am. Rep. 89; Harris v. Baltimore (1890), 73 Md. 22, 20 Atl. 111, 25 Am. St. Rep. 565, 8 L. R. A. 677.

This rule has been applied to partnerships carrying on the real estate, loan and insurance business, on commission, Lee v. First National Bank, *supra;* Deardorf v. Thacher (1883), 78 Mo. 128, 47 Am. Rep. 95; Schele v. Wagner (1904), 163 Ind. 20, 71 N. E. 127 (but otherwise it was held where the firm bought and sold land on its own account, Adams v. Long (1904), 114 Ill. App. 277); milling, Lanier v. McCabe (1848), 2 Fla. 32, 48 Am. Dec. 173; water-works, Broughton v. Manchester Waterworks (1819), 3 Barn. & Ald. 1; gas works, Bramah v. Roberts (1837), 3 Bing. N. Cas. 963; printing and publishing, Pooley v. Whitmore, *supra;* Bays v. Conner (1885), 105 Ind. 415, 5 N. E. 18; planting, Prince v. Crawford (1874), 50 Miss. 344; farming, Greenslade v. Dower (1828), 7 Barn. & Cr. 635; Walker v. Walker (1894), 66 Vt. 285, 29 Atl. Rep. 146; keeping a tavern, Cocke v. Branch Bank (1841), 3 Ala. 175; carrying on a theater, Pease v. Cole, *supra;* operating a threshing machine, Horn v. City Bank (1884), 32 Kan. 518, 4 Pac. 1022; keeping livery-stable, Levi v. Latham, *supra;* carrying on a laundry, Neale v. Turton (1827), 4 Bing. 149; digging tunnels, Gray v. Ward (1856), 18 Ill. 32; practicing law, Friend v. Duryee, *supra;* or medicine, Crosthwait v. Ross (1839), 1 Humph. (Tenn.) 23, 34 Am. Dec. 613; sawing lumber, Dowling v. National Bank (1891), 145 U. S. 512, 36 L. ed. 795, 12 Sup. Ct. 928, Mechem's Cas. 356; building, Sniveley v. Matheson (1895), 12 Wash. 88, 40 Pac. 628, 50 Am. St. R. 877; paving, Harris v. Baltimore, *supra;* well-boring or digging, Vetsch v. Neiss (1896), 66 Minn. 459, 69 N. W. 315, Burd. Cas. 328, Gilm. Cas. 379; operating moving-pictures, Higgins v. Beauchamp [1914], 3 K. B. 1192; buying land and cutting and selling lumber therefrom, National State Bank v. Noyes (1882), 62 N. H. 35; mining, Childers v. Neely (1899), 47 W. Va. 70, 34 S. E. 828, 49 L. R. A. 468, 81 Am. St. R. 777, Mechem's Cas. 34; Congdon v. Olds (1896), 18 Mont. 487, 46 Pac. 261, Burd. Cas. 331; constructing and operating a rural telephone system; Schumacher v. Sumner Telephone Co. (1913), 161 Iowa 321, 142 N. W. 1034, Ann. Cas. 1916 A 201. Partnership for a single venture only (see *ante*, § 16) would usually be non-trading: Gray v. Ward (1856), 18 Ill. 32; Bentley v. White (1842), 42 Ky. (3 B. Mon.) 263, 38 Am. Dec. 186.

bona fide holder recover if the paper were given for the individual debt of a partner. To enable any person to recover, therefore, upon negotiable paper given by a partner in a non-trading firm, the plaintiff must be prepared to show either such consent of the other partners, such necessity, or such usage as will take the case out of the general rule.[48]

§ 258. —— **Borrowing money.**—The authority to borrow money rests upon substantially the same considerations as the authority to execute negotiable paper, and is usually exercised with it. In a trading firm the authority impliedly exists for partnership purposes,[49] but not, it is said, in a non-trading firm.[50] In the latter case it can be justified only by prior authorization, custom, necessity, or subsequent ratification. If the borrowing was actually or ostensibly authorized, the firm will be bound though the partner misappropriates the money.[51] So if the borrowing was ostensibly authorized a *bona fide* lender may recover even though the partner borrowing was actually obtaining the money for himself.[52]

§ 259. —— **Buying.**—The distinction between trading and non-trading firms is material, but not conclusive as to the implied authority to buy. In the case of the trading firm, whose business it is, in whole or in part, to buy goods for use or sale, the authority of each partner to buy such goods must clearly

48 See Rumsey v. Briggs (1893), 139 N. Y. 323, 34 N. E. 929.

49 See Rothwell v. Humphreys (1795), 1 Esp. 406, Ames' Cas. 535, Burd. Cas. 313, Gilm. Cas. 366; Howze v. Patterson (1875), 53 Ala. 205, 25 Am. Rep. 607; Walsh v. Lennon (1881), 98 Ill. 27, 38 Am. Rep. 75; Sherwood v. Snow (1877), 46 Iowa 481, 26 Am. Rep. 155; Harris v. Baltimore (1890), 73 Md. 22, 17 Atl. 1046, 20 Atl. 111, 985, 25 Am. St. Rep. 565, 8 L. R. A. 677; Gilchrist v. Brande (1883), 58 Wis. 184, 15 N. W. 817; Coller v. Porter (1891), 88 Mich. 549, 50 N. W. 658; Prince v. Crawford (1874), 50 Miss. 344; Salt Lake Brewing Co. v. Hawke (1901), 24 Utah 199, 66 Pac. 1058.

50 See Harris v. Baltimore, *supra*. But see Hoskinson v. Eliot (1869), 62 Pa. St. 393; Leffler v. Rice (1873), 44 Ind. 103, Gilm. Cas. 368, though these were probably both trading partnerships.

51 See National State Bank v. Noyes (1882), 62 N. H. 35.

52 See Hayward v. French (1859), 12 Gray (78 Mass.) 453.

be implied. It must also be implied in the case of a non-trading firm if the purchase is within the scope of the business as actually conducted.[53]

The purchase may be on credit, and may be of either real or personal property within the limits stated.

If the authority actually or ostensibly exists, the firm is none the less bound because the partner buying subsequently misapplied the goods.[54]

An unauthorized purchase may, of course, be ratified by the other partners.[55]

§ 260. —— Collecting and receiving payment.—Every partner in a firm, whether trading or non-trading, has, unless there has been an agreement to the contrary, implied authority to

[53] See Bond v. Gibson (1808), 1 Camp. 185, Mechem's Cas. 938, Ames' Cas. 537, Burd. Cas. 311, Gilm. Cas. 366; Alley v. Bowen-Merrill Co. (1905), 76 Ark. 4, 88 S. W. 838, 113 Am. St. R. 73, Mechem's Partn. Cas. 939; Hoffmaster v. Hodges (1908), 154 Mich. 641, 118 N. W. 484; Lynch v. Thompson (1883), 61 Miss. 354; Stillman v. Harvey (1879), 47 Conn. 27; Johnston v. Trask (1889), 116 N. Y. 136, 22 N. E. 377, 15 Am. St. R. 394, 5 L. R. A. 630; Ketcham Bank v. Hagen (1900), 164 N. Y. 446, 58 N. E. 523; Davis v. Cook (1879), 14 Nev. 265; Kenney v. Altvater (1874), 77 Pa. St. 34. Where several persons put up a building as partners and one of them buys brick for the purpose without any express understanding that it was an individual purchase, and the brick are used in the building, the partners are liable for the price: Stecker v. Smith (1881), 46 Mich. 14, 8 N. W. 583, Gilm. Cas. 367. Agreement to buy or take back goods previously sold: Johnston v. Trask, *supra.;* Other partner not bound to seller who knew purchase to be unauthorized: Sutton v. Weber (1904), 127 Iowa 361, 101 N. W. 775; Sladen v. Lance (1909), 151 N. Car. 492, 66 S. E. 449; or where this was apparent from the nature of the firm's business, Sargent v. Henderson (1887), 79 Ga. 268, 5 S. E. 122. A partner in a firm engaged in selling goods on commission has no apparent authority to buy goods on credit. Alabama Fertilizer Co. v. Reynolds (1887), 85 Ala. 19, 4 So. 639.

See also Iroquois Rubber Co. v. Griffin (1919), 226 N. Y. 297, 123 N. E. 369.

[54] Bond v. Gibson, *supra;* Kenney v. Altvater, *supra;* Hoffmaster v. Hodges, *supra;* nor does the fact that the buying partner had planned to cheat his partner defeat a recovery if the seller was innocent: Clark v. Johnson (1879), 90 La. 442.

[55] Porter v. Curry (1869), 50 Ill. 319, 99 Am. Dec. 520, Mechem's Cas. 343, Gilm. Cas. 368; Hoffmaster v. Hodges, *supra.*

receive payment of debts and other obligations due to the firm, and to give receipts or discharges therefor.[56] In this respect he stands, not as a mere special agent to collect or receive payment, but as a general agent with powers co-extensive with the scope of the business. He may settle an account with a debtor and take a bill or note in payment,[57] though he may not ordinarily take goods unless that is customary,[58] and, of course, he has no implied authority to accept his own outstanding note in payment, or offset the firm debt against one of his own, or accept goods for himself in payment of the debt due to the firm.[59]

Here, as in other cases of course, if the payment to the partner was justified, the fact that such partner afterwards misappropriated the money would not affect the creditor if he was not a party to the partner's default.[60]

§ 261. —— Compromising debts.—A partner's authority to bind the firm by the compromise of a debt due to it is frequently laid down in general terms, and there can be no doubt that one partner has authority, in the ordinary course of the business, to adjust, settle or compromise the claims which the partnership has or makes against third persons. Such an adjustment of differences is not only common but frequently necessary. Nevertheless this authority is certainly not without limitation, and must be exercised without fraud or collusion, in good faith and with reasonable prudence.[61]

56 Allen v. Farrington (1855), 2 Sneed (Tenn.), 526; Noyes v. New Haven, etc., R. Co. (1861), 30 Conn. 1; Major v. Hawkes (1850), 12 Ill. 298; Prentice v. Elliott (1883), 72 Ga. 154; Salmon v. Davis (1812), 4 Binn. (Pa.) 375, 5 Am. Dec. 410; Moist's Appeal (1873), 74 Pa. 166; Huffman Farm Co. v. Rush (1896), 173 Pa. 264, 33 Atl. 1013.

57 Heartt v. Walsh (1874), 75 Ill. 200.

58 Lee v. Hamilton (1854), 12 Tex. 413.

59 See Eady v. Newton Coal Co. (1905), 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; Gregg v. James (1825), Breese (Ill.), 143, 12 Am. Dec. 151; Warder v. Newdigate (1851), 11 B. Mon. (Ky.) 174, 52 Am. Dec. 566; Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776; Farwell v. St. Paul Trust Co. (1891), 45 Minn. 495, 48 N. W. 326, 22 Am. St. R. 742; Viles v. Bangs (1874), 36 Wis. 131; Cotzhausen v. Judd (1877), 43 Wis. 213.

60 See Huffman Farm Co. v. Rush, *supra*.

61 See Lindley on Partnership,

§ 262. —— **Confessing judgment.**—One partner has no implied authority to confess judgment or to give a warrant of attorney to confess judgment against the firm upon a debt due by it, though the judgment may often be valid against the confessing partner as an individual.[62] The Uniform Partnership Act is to the same effect as respects the implied authority.[63]

The reason for the rule as here given is found in the belief that the act of one partner in undertaking to confess a judgment against his copartner and thereby cutting the latter off from his opportunity to appear and be heard, is an unusual act, not within the ordinary scope of the business, and therefore not within the range of a partner's implied authority. In practice the question is often complicated by the fact that the power of attorney given by one partner to confess the judgment was under seal,[64] for the execution of which the partner's authority was inadequate, as will be seen in the following section.

Although the authority is thus not implied, previous assent or subsequent ratification may make the act good.[65]

(7th ed.) 161; Pierson v. Hooker (1808), 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Noyes v. Railroad Co. (1861), 30 Conn. 1; Hawn v. Land Co. (1887), 74 Cal. 418, 16 Pac. 196; Dyer v. Sutherland (1874), 75 Ill. 583; Webber v. Webber (1906), 146 Mich. 31, 109 N. W. 50; Allen v. Cheever (1881), 61 N. H. 32; Stout v. Ennis Nat. Bank (1887), 69 Tex. 384, 8 S. W. 808.

62 See Hier v. Kaufman (1890), 134 Ill. 215, 25 N. E. 217; Davenport-Mills Co. v. Chambers (1896), 146 Ind. 156, 44 N. E. 1109; North v. Mudge (1862), 13 Iowa 496, 81 Am. Dec. 441; Morgan v. Richardson (1852), 16 Mo. 409, 57 Am. Dec. 235, Mechem's Cas. 361, Gilm. Cas. 370; Soper v. Fry (1877), 37 Mich. 236. In Pennsylvania, see Boyd v. Thompson (1893), 153 Pa. 78, 25 Atl. 769, 34 Am. St. Rep. 685; Adams v. Leeds (1900), 195 Pa. 70, 45 Atl. 666; 62 Un. of Pa. L. Rev. 621. In Virginia, see Alexander v. Alexander (1888), 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; and in Louisiana, see Wilmot v. The Ouachita Belle (1880), 32 La. Ann. 607. As to how the question may be raised, see Farwell v. Huston (1894), 151 Ill. 239, 37 N. E. 864, 42 Am. St. R. 237; Alexander v. Alexander, *supra*.

63 Sec. 9. (3) *d.* "Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to * * * confess a judgment."

64 As to this, see Alexander v. Alexander, *supra*.

65 See Bivingsville Mfg. Co. v. Bobo (1858), 11 Rich. (S. Car.) L. 386; Overton v. Tozer (1838), 7 Watts (Pa.) 331.

§ 263. —— Deeds, bonds and other instruments under seal.— It is the general rule that one partner has no implied authority to bind his copartners by a deed, bond, mortgage or other instrument in the firm name or in the partners' names under seal;[66] though the partner executing it may thereby bind himself in many cases, either upon the instrument itself or upon an implied warranty of authority.[67] There is, in many cases, the very substantial reason that the act involving the execution of the sealed instrument, like selling or mortgaging land, or giving many kinds of bonds, was not within the range of the implied authority of a partner; but the case is usually put upon the generally well settled though highly technical rule of the common law that authority for the execution of instruments requiring a seal can be conferred only by an instrument under seal, and that ratification of such an act can be effected only in the same manner. It is not enough to satisfy this rule that the articles of partnership were under seal, unless they also in fact gave the authority.[68] Execution in the presence and by the request or with the consent of the other partners is not within the rule requiring authority under seal.[69] To sustain such instruments against the other partners therefore, when executed by a single partner, the previous authorization or subsequent ratification by the other partners must usually be shown.[70] In accordance with the rule referred to, this authorization or ratifi-

[66] See Van Deusen v. Blum (1836), 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Schmertz v. Shreeve (1869), 62 Pa. 457, 1 Am. Rep. 439; McDonald v. Eggleston (1853), 26 Vt. 154, 60 Am. Dec. 303; Fox v. Norton (1861), 9 Mich. 207, Mechem's Cas. 362; Kock v. Endriss (1893), 97 Mich. 444, 56 N. W. 847; Moore v. Stevens (1883), 60 Miss. 809.

[67] See Van Deusen v. Blum, *supra;* Weeks v. Mascoma Rake Co. (1877), 58 N. H. 101.

[68] See Harrison v. Jackson (1797), 7 T. R. (Durnf. & E.) 207, Ames' Cas. 485, Burd. Cas. 343, Gilm. Cas. 382.

[69] See Merchants Bank v. Johnston (1908), 130 Ga. 661, 61 S. E. 543, 14 Ann. Cas. 546, 17 L. R. A. (N. S.) 969.

[70] McDonald v. Eggleston (1853), 26 Vt. 154, 60 Am. Dec. 303, Gilm. Cas. 383; Russell v. Annable (1871), 109 Mass. 72, 12 Am. Rep. 665; Hull v. Young (1889), 30 S. C. 121, 8 S. E. 695, 3 L. R. A. 521. As to the necessity of knowledge that a sealed instrument was to be ratified, see Hull v. Young, *supra.*

cation must be under seal, and the English and some American cases [71] so hold. But so far as the requirement of the seal is concerned, there has been a great relaxation in the partnership cases in many of the States, and it is doubtless the weight of modern American authority that this authorization or ratification may be effected by parol.[72]

§ 264. —— A release of a firm obligation is an exception to this rule forbidding the execution of sealed instruments; and an act unnecessarily done under seal may, if otherwise valid, be sustained in many States by the rejection of the seal as surplusage,[73] or recovery may be had on the original consideration, if any, which preceded the giving of the sealed instrument.[74]

71 See Gordon v. Funkhouser (1902), 100 Va. 675, 42 S. E. 677.

72 Tischler v. Kurtz (1895), 35 Fla. 323, 17 So. 661; Peine v. Weber (1868), 47 Ill. 41; Fox v. Norton, *supra;* Cady v. Shepherd (1831), 11 Pick. (Mass.) 400, 22 Am. Dec. 379; Golding v. Brennan (1903), 183 Mass. 286, 67 N. E. 239; Sterling v. Bock (1889), 40 Minn. 11, 41 N. W. 236; Smith v. Kerr (1849), 3 N. Y. 144. In McGahan v. Bank of Rondout (1894), 156 U. S. 218, 39 L. ed. 403, 15 Sup. Ct. 347, it is said: "The settled rule in this country is that where a deed is executed on behalf of a firm by one partner the other partner will be bound if there be either a previous parol authority or a subsequent parol adoption of the act; and that ratification may be inferred from the presence of the other partner at the execution and delivery, or from his acting under it or taking the benefits of it with knowledge."

73 See Edwards v. Dillon (1893), 147 Ill. 14, 35 N. E. 135, 37 Am. St. R. 199, Gilm. Cas. 387; Price v. Alexander (1850), 2 Greene (Iowa) 427, 52 Am. Dec. 526; Cook v. Gray (1882), 133 Mass. 106; Sterling v. Bock, *supra;* Cowan v. Cunningham (1907), 146 N. Car. 453, 59 S. E. 992; Schneider v. Schmidt (1913), 82 N. J. Eq. 81, 88 Atl. 179; Boyd v. Thompson, *supra;* Hocking v. Hamilton (1893), 158 Pa. 107, 27 Atl. 836; Skinner v. Dayton (1822), 19 Johns. (N. Y.) 513, 10 Am. Dec. 286. Thus if a partner in selling or transferring property for the firm unnecessarily does so by a sealed instrument, the validity of the transaction is not impaired: Everit v. Strong (1843), 5 Hill (N. Y.) 163, 7 Hill 585; McCullough v. Sommerville (1836), 8 Leigh (Va.) 415; Dubois' Appeal (1861), 38 Pa. 231, 80 Am. Dec. 478.

74 See Purviance v. Sutherland (1853), 2 Ohio St. 478; Walsh v. Lennon (1881), 98 Ill. 27, 38 Am. Rep. 75. In such cases the instrument, while not binding the partnership, may be evidence that the partner was acting for the firm and creating a firm obligation.

The creditor who seeks to recover on the original claim must usually

Occasional cases have gone further and upheld the execution of such sealed instruments as are usually given in the ordinary execution of the partnership business, without regard to any special authority.[75]

The Uniform Partnership Act also adopts this view.[76]

§ 265. —— Hiring or leasing property.—One partner has implied authority to bind the firm by contracts for the hiring of such property as the usual prosecution of the firm business requires. Thus, for example, one partner may bind the firm by a contract for the leasing of premises on which to carry on the business of the firm,[77] or for the hiring of horses necessary for the conduct of the partnership affairs.[78] If the hiring was apparently within that partner's authority the other partners would be bound, even though such partner subsequently wrongfully diverted or misapplied the property hired.[79]

§ 266. —— Insurance.—One partner has implied authority to bind the firm by contracts for the insurance of the partnership property.[80] In case of loss, his authority extends to making

surrender the sealed note, etc., for cancellation.

75 For example, a charter party, by a partner in a partnership engaged in shipping. Straffin v. Newell (1808), Charl. (Ga.) 163, 4 Am. Dec. 705, Burd. Cas. 344.

76 Sec. 9(1) in "including the execution in the partnership name of any instrument," etc., makes no distinction as to sealed instruments. See, also, Sec. 10.

77 Woolsey v. Henke (1905), 125 Wis. 134, 103 N. W. 267; Seaman v. Ascherman (1883), 57 Wis. 547, 15 N. W. 788; Stillman v. Harvey (1879), 47 Conn. 26; Smith v. Cisson (1867), 1 Colo. 29. As will be seen in a later section, the firm may be bound upon a lease made for it and accepted by it, though made in the name of one partner only: Penn v. Kearny (1869), 21 La. Ann. 21; Marks v. Chumos (1910), 82 Kan. 562, 109 Pac. 397.

As a matter of pleading, held that a declaration on a lease made by one partner in a non-trading firm should state facts which showed that he was acting for the partnership and within the scope of its business. Alsop v. Central Trust Co. (1897), 100 Ky. 375, 38 S. W. 510, 18 Ky. Law R. 830, Burd. Cas. 340.

78 Sweet v. Wood (1893), 18 R. I. 386, 28 Atl. 335, Mechem's Cas. 332.

79 Sweet v. Wood, *supra*.

80 Hooper v. Lusby (1814), 4 Camp. 66; Peoria Ins. Co. v. Hall (1864), 12 Mich. 202.

proofs of loss [81] and to the settlement of the loss with the insurance company.[82] He may also bind the firm by consenting to the cancellation or surrender of a policy.[83]

§ 267. ——Mortgages and pledges.—The implied authority of one partner, in borrowing money for the partnership, to give the usual form of security, including pledge or mortgage of the personal property of the firm to secure the money borrowed, seems to be co-extensive with the authority to borrow.[84] In respect of mortgages and pledges to secure partnership indebtedness previously contracted, the authorities are not in harmony, but the prevailing rule is that one partner has the implied authority to mortgage, certainly part, and usually all, of the property of the firm kept for sale,[85] to secure the payment of the firm debts.[86] As to that not kept for sale, the authority of a

81 Myers v. Council Bluffs Ins. Co. (1887), 72 Iowa 176, 33 N. W. 453.

82 Brown v. Hartford Ins. Co. (1875), 117 Mass. 479.

83 Hillock v. Traders' Ins. Co. (1884), 54 Mich. 531, 20 N. W. 571.

84 See *ante*, § 258.

Since a partner in a non-trading firm has usually no implied authority to borrow money, he would have no implied authority to pledge firm property for money borrowed. Harris v. Baltimore (1890), 73 Md. 22, 17 Atl. 1046, 25 Am. St. R. 565, 8 L. R. A. 677, 20 Atl. 111, 985.

85 Since the ordinary implied authority of the partner is to carry on the business rather than to wind it up or cripple it, a distinction between mortgaging or pledging a part only rather than all, or that kept for sale rather than that whose possession is essential to continue the business, seems in many cases to be an important and natural one. (See the Uniform Partnership Act, Sec. 9, (3) c.) So, in many cases, the distinction is important between ordinary situations when the business is going on normally, and those wherein an emergency exists which may justify unusual measures.

86 See Tapley v. Butterfield (1840), 1 Metc. (Mass.) 515, 35 Am. Dec. 375, Burd. Cas. 211; Donald v. Hewitt (1859), 33 Ala. 534, 73 Am. Dec. 431; Robards v. Waterman (1893), 96 Mich. 233, 55 N. W. 662; Hage v. Campbell (1891), 78 Wis. 572, 47 N. W. 179, 23 Am. St. R. 422, Mechem's Cas. 609; Citizens' Nat. Bank v. Johnson (1890), 79 Iowa 290, 44 N. W. 551; McCarthy v. Seisler (1891), 130 Ind. 63, 29 N. E. 407; Phillips v. Furniture Co. (1890), 86 Ga. 699, 13 S. E. 19; Horton v. Bloedorn (1893), 37 Neb. 666, 56 N. W. 321; Letts-Fletcher Co. v. McMaster (1891), 83 Iowa 449, 49 N. W. 1035; Union Bank v. Kansas City Bank (1890), 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. ed. 341; Keck v. Fisher (1875), 58 Mo. 532.

single partner to mortgage it all would seem to be subject to substantially the same limitations as the authority to assign for the benefit of creditors,[87] *i. e.*, the existence of some exigency and the inability to consult with the others.

But one partner has, of course, no implied authority to pledge or mortgage the partnership property to secure his own private debts, and of this the party taking it presumptively has knowledge.[88] The latter can only hold, as a rule, where he can work an estoppel against the claims of the other partners.[89]

§ 268. —— With respect of partnership real estate, the case is less simple. If it were land kept or held for sale,[90] as distinguished from basic, essential property or plant, the authority of one partner to use it for the purpose of securing the payment of firm debts would usually be implied; though, because of the technical rules relating to the execution of deeds and similar conveyances by one partner,[91] he could ordinarily pass equitable titles only rather than legal,[92] unless the legal title happened to stand in his name.[93]

87 One partner alone, without concurrence of others who were accessible, *held* not to have implied authority to practically terminate the business by mortgaging *all* the tangible property of the firm. McGrath v. Cowen (1898), 57 Ohio 385, 49 N. E. 338 (citing Sloan v. Moore (1860), 37 Pa. 217; Osborne v. Barge (1887), 29 Fed. 725). See, also, Carr v. Hertz (1895), 54 N. J. Eq. 127, 33 Atl. 194; Ellis v. Allen (1886), 80 Ala. 515, 2 So. 676; Rock v. Collins (1898), 99 Wis. 630, 75 N. W. 426.

88 See Livingston v. Roosevelt (1809), 4 Johns. (N. Y.) 251, 4 Am. Dec. 273; Stockdale v. Ullery (1860), 37 Pa. 486, 78 Am. Dec. 440; Deeter v. Sellers (1885), 102 Ind. 458, 1 N. E. 854; Oliphant v. Markham (1891), 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363. Such a mortgage might, however, often be made effective upon the *interest* of the partner making it, *i. e.*, subject to the settlement of proper partnership claims. Patterson v. Atkinson (1897), 20 R. I. 102, 37 Atl. 532.

89 Compare Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776; Todd v. Lorah (1874), 75 Pa. 155; Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631.

90 See Rovelsky v. Brown (1891), 92 Ala. 522, 9 So. 182, 25 Am. St. R. 83, Mechem's Cas. 832.

91 See *ante*, §§ 263, 264.

92 See Long v. Slade (1898), 121 Ala. 267, 26 So. 31, which relies upon the theory (see *ante*, § 163) that partnership land is in equity regarded for partnership purposes as personalty.

93 See Chittenden v. German-American Bank (1880), 27 Minn. 143, 6 N. W. 773.

§ 269. —— A sole managing partner,[94] or a solvent partner whose partner has become a bankrupt,[95] or a partner left to bear the brunt by one who has absconded,[96] may easily be found to have an enlarged authority; and, as will be seen hereafter,[97] a surviving partner is usually in the situation of a general administrator of the partnership estate.

§ 270. —— **Notice.**—Notice to or knowledge of one partner in relation to partnership matters is, in general, notice to or knowledge of the partnership.[98] Although not all of the questions have arisen in partnership cases, the rules applicable in agency would doubtless apply, *i. e.*, that the notice or knowledge will be imputed if, and only if, acquired in relation to the partnership business and either during the partnership or, according to what is probably the weight of authority, before its formation if still remembered, or so soon before its creation that the partner must be presumed to have remembered it.[99] The exceptions to the general rule would also doubtless apply here if there was a duty not to disclose or if the partner were really acting adversely or were colluding with the party claiming the benefit of the notice, to defraud the partnership.[1]

The Uniform Partnership Act also imputes notice to or knowledge of another partner than the one acting where the partner who had it "reasonably could and should have communicated it to the acting partner."[2]

94 See O'Neal v. Judsonia Bank (1914), 111 Ark. 589, 164 S. W. 295.

95 See Ogden v. Arnot (1883), 29 Hun (N. Y.) 146, Mechem's Cas. 996, Burd. Cas. 461.

96 See Hamill v. Hamill (1867), 27 Md. 679; Sullivan v. Smith (1884), 15 Neb. 476, 19 N. W. 620, 48 Am. R. 354.

97 See *post*, §§ 402, 403.

98 See Tucker v. Cole (1882), 54 Wis. 539; Holton v. McPike (1881), 27 Kan. 286; Herbert v. Odlin (1860), 40 N. H. 267; Howland v. Davis (1879), 40 Mich. 546; Fereira v. Silvey (1918), — Cal. App. —, 176 Pac. 371.

99 See Mechem on Agency (2d ed.), §§ 1802-1842.

See remarks of Jessel, M. R., in Williamson v. Barbour (1877), 9 Ch. D. 529, 535.

Notice not imputed unless partner was acting as agent for the partnership. Anthony v. Jeffress (1916), 172 N. Car. 378, 90 S. E. 414; Baldwin v. Leonard (1867), 39 Vt. 260, 94 Am. Dec. 324.

1 See Bignold v. Waterhouse (1813), 1 Maule & Sel. 255; *Ex parte* Heaton (1819), Buck, 386.

2 Sec. 12. "Notice to any part-

§ 271. ——Within the operation of this rule of notice fall a great variety of cases—formal or informal notice to one partner of adverse or outstanding liens, mortgages or other interests,[3] formal notice to perform or receive performance of contracts,[4] notices of dishonor,[5] notices to quit,[6] and the like.

Not within the rule would be cases in which the partner was not, at the time, acting for the partnership, as where he wrongfully appropriates trust funds in his possession to the payment of his agreed contribution to the partnership capital, of which fact the other partners were ignorant, and the like.[7]

Clearly also this rule does not apply to ordinary legal process, —that must be personally served upon every partner against whom a *personal* judgment is sought,[8] although less than personal service on each may at times by statute sustain a judgment good against firm property, as well as against the partners actually served.[9] To this extent the partnership is often regarded as a distinct entity.

ner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

3 See Tucker v. Cole (1882), 54 Wis. 539, 11 N. W. 703; Adams v. Ashman (1902), 203 Pa. 536, 53 Atl. 375; Dresser v. Wood (1895), 15 Kan. 344.

4 See McFarland v. Crary (1828), 8 Cow. (N. Y.) 253; Renfro v. Adams (1878), 62 Ala. 302; Nott v. Downing (1834), 6 La. 680, 26 Am. Dec. 491.

5 See Gates v. Beecher (1875), 60 N. Y. 518, 19 Am. Rep. 207, Mechem's Cas. 1020.

6 Where the firm is the tenant. See Walker v. Sharpe (1869), 103 Mass. 154.

7 See Englar v. Offutt (1889), 70 Md. 78, 16 Atl. 497, 14 Am. St. R. 332, Mechem's Cas. 398; Gilruth v. Decell (1894), 72 Miss. 232, 16 So. 250; Penn v. Folger (1899), 182 Ill. 76, 55 N. E. 192; Bienenstok v. Ammidown (1898), 155 N. Y. 47, 49 N. E. 321.

8 See Wood v. Watkinson (1846), 17 Conn. 500, 44 Am. Dec. 562; McDoel v. Cook (1848), 2 N. Y. 110; Allen v. Chadsey (1849), 1 Ind. 399, 1 Smith 200; Swift v. Green (1858), 20 Ill. 173; Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Mitchell v. Greenwald (1870), 43 Miss. 167; Mason v. Eldred (1867), 6 Wall. (U. S.) 231, 18 L. ed. 783, Mechem's Cas. 433.

9 See Barnes v. Colorado, etc., R. Co. (1908), 42 Colo. 461, 94 Pac. 570; Heaton v. Schaeffer (1912), 34 Okla. 631, 126 Pac. 797, 43 L. R. A.

§ 272. ——Paying debts.—Unless the contrary has been agreed upon, each partner has implied authority to pay the firm debts out of the firm funds; and he may sell or transfer the firm property in payment of firm debts under the same conditions at least that he might pledge or mortgage it for the purpose of securing their payment,[10] and many cases state the rule still more positively.[11] He has no implied authority, of course, to pay his private debt with partnership funds, and cannot lawfully transfer partnership property in satisfaction of such a debt,[12] though he might transfer his residuary interest therein for such a purpose. Property or credits actually belonging to the partnership but caused or permitted by the other partners to appear to belong to one partner only, would be subject to a different rule for the protection of a *bona fide* transferee.[13]

As will be seen hereafter,[14] each partner for his own protec-

(N. S.) 540; Goldstein v. Fox (1912), 22 N. Dak. 636, 135 N. W. 180, 40 L. R. A. (N. S.) 566; Brumwell v. Stebbins (1891), 83 Iowa 425, 49 N. W. 1020; Rickman v. Rickman (1914), 180 Mich. 224, 252, 146 N. W. 609, Ann. Cas. 1915 C 1237; Richard v. Allen (1887), 117 Pa. 199, 11 Atl. 552, 2 Am. St. R. 652; First Nat. Bank v. Greig (1901), 43 Fla. 412, 31 So. 239.

10 See Ullman v. Myrick (1890), 93 Ala. 532, 8 So. 410; Hanchett v. Gardner (1891), 138 Ill. 571, 28 N. E. 788; Russell v. Leland (1866), 12 Allen (Mass.) 349; Waite v. Vinson (1894), 14 Mont. 405, 36 Pac. 828; Mabbett v. White (1855), 12 N. Y. 442; Graser v. Stellwagen (1862), 25 N. Y. 315.

11 Thus in Graser v. Stellwagen, *supra*, it is said to be settled in New York that a single partner has the power, in the absence of fraud, notwithstanding the dissent of his copartner, to transfer all the property of the partnership in payment of one or more debts of such partnership. In Mabbett v. White, *supra*, it is held that the fact that the firm is insolvent, and that a preference is given to one creditor, does not alter the rule.

12 See Cannon v. Lindsey (1887), 85 Ala. 198, 3 So. 676, 7 Am. St. R. 38; Janney v. Springer (1889), 78 Iowa 617, 43 N. W. 461, 16 Am. St. R. 460, Gilm. Cas. 243; Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776; Todd v. Lorah (1874), 75 Pa. 155; Hartley v. White (1880), 94 Pa. 31, Gilm. Cas. 245; Rogers v. Betterton (1894), 93 Tenn. 630, 27 S. W. 1017. But see Warren v. Martin (1888), 24 Neb. 273, 38 N. W. 849.

13 See Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631; Reid v. Hollinshead (1825), 4 B. & Cr. 867, 7 Dow. & Ry. 444. Money and negotiable instruments are governed by special rules.

14 See *post*, Ch. XIX.

tion has ordinarily a right, commonly spoken of as a lien, which enables him to secure the application of the partnership assets to the payment of the partnership debts, and of this right he cannot be deprived without his own consent. His authority, already stated, to himself apply the partnership property to the satisfaction of the partnership debts, is in the nature of a power coupled with an interest or a power given by way of security, and cannot be absolutely revoked by his copartner,[15] even though it should be conceded that there might be effective dissent as to its exercise in a particular case.

§ 273. —— While he is not obliged to do so, one partner may advance his own money to pay a partnership debt (the claims of his individual creditors not being involved), and be allowed the amount in a partnership accounting.

Firm funds paid generally by a partner to a firm creditor to whom such partner is also individually indebted, must be applied by the creditor upon the partnership debt and not upon the individual one unless the other partners consent,[16] and even with such consent such an application might often be impeached by firm creditors.[17] The application of individual funds to partnership claims [18] may involve corresponding difficulties.[19]

15 See Mabbett v. White, *supra;* Graser v. Stellwagen, *supra;* Blodgett v. American National Bank (1881), 49 Conn. 9, 24.

It is true that the contrary is asserted in Hanchett v. Gardner, *supra,* but it is believed that the rule, so broadly stated, is unsound, and it is not sustained by the cases there cited in its support. In Halstead v. Shepard (1853), 23 Ala. 558, cited by the court, the debt to be paid was not a firm debt but the private debt of one partner. There is a marked distinction between revoking authority of a partner for new purchases, borrowings, and the like, and revoking authority to pay debts already incurred, for which the partner who seeks to pay them may otherwise be held personally liable, and which he desires to pay with property partly belonging to him and contributed to the partnership for that very purpose.

16 See Cornells v. Stanhope (1883), 14 R. I. 97; Flarsheim v. Brestrup (1890), 43 Minn. 298, 45 N. W. 438; Farris v. Morrison (1899), 66 Ark. 318, 50 S. W. 693; Nichols v. Thomas (1915), 51 Okla. 212, 151 Pac. 847, L. R. A. 1916 B 908 (transferee charged with notice).

17 See *post,* § 444.

18 See Miles v. Ogden (1882) 54 Wis. 573, 12 N. W. 81

19 See *post,* § 445.

§ 274. —— **Sales.**—Each partner has ordinarily implied authority, resulting from the very nature of the case, to sell, assign or dispose of, in the regular course of business, so much of the partnership personalty as is kept for sale. This is most strongly exemplified, of course, in the case of the trading-partnership whose regular business it is to buy and sell; but it would also be true *pro tanto* in other partnerships which had property held or kept for sale. There seems to be no limit upon the amount of such property which he may thus sell, even though it be the whole property of the firm, and he may pass the entire title to it.[20] He may also sell or transfer, in the course of the business, choses in action and other intangible property of the firm, such as its accounts and bills receivable, patent-rights, and the like.[21] And upon the sale he may give such warranties of title or quality, or may make such incidental contracts in relation thereto, as are usually made in like cases.

The implied authority of one partner, arising merely from the fact of the partnership, to sell the entire property of the firm is, by the weight of authority, limited to that kept for sale, and does not include the authority to sell that kept for the purposes of carrying on the business, and the sale of which would defeat or prevent the further prosecution of the business.[22] The necessity of paying debts or some exigency requiring

20 See Ellis v. Allen (1886), 80 Ala. 512, 2 So. 676 (what was said in this case about one partner's dissent was pure *dictum*); Crites v. Wilkinson (1884), 65 Cal. 559, 4 Pac. 567; Mabbett v. White (1855), 12 N. Y. 442, Burd. Cas. 212; Graser v. Stillwagen (1862), 25 N. Y. 315; Schneider v. Sansom (1884), 62 Tex. 201; Boswell v. Green (1856), 25 N. J. L. 390; Clark v. Rives (1863), 33 Mo. 579.

21 See Gerli v. Poidebard Silk Mfg. Co. (1894), 57 N. J. L. 432, 31 Atl. 401, 51 Am. St. R. 611, 30 L. R. A. 61; Sullivan v. Visconti (1902), 68 N. J. L. 543, 53 Atl. 598, 69 N. J. L. 452, 55 Atl. 1133; Clarke v. Hogeman (1878), 13 W. Va. 718; First Nat. Bank v. Freeman (1882), 47 Mich. 408, 11 N. W. 219; Mills v. Barber (1810), 4 Day (Conn.) 428.

22 See Lowman v. Sheets (1890), 124 Ind. 417, 24 N. E. 351, 7 L. R. A. 784, Mechem's Cas. 367; Sloan v. Moore (1860), 37 Pa. 217, Gilm. Cas. 231; Carrie v. Cloverdale Co. (1891), 90 Cal. 84, 27 Pac. 58; Cayton v. Hardy (1858), 27 Mo. 536; Blaker v. Sands (1883), 29 Kan. 551; McGrath v. Cowen (1878), 57 Ohio 385, 49 N. E. 338; Rutherford v. McDonnell (1899), 66 Ark. 448,

action when the other partners cannot be consulted may extend the authority even to the latter class of property.

The authority to sell is, of course, limited to sales apparently on the partnership account only and not for the benefit of the selling partner alone;[23] though where the other partners cause or permit the selling partner to appear as the individual owner *bona fide* purchasers from him are usually protected.[24]

51 S. W. 1060; Drake v. Thyng (1881), 37 Ark. 228. See elaborate Note in L. R. A. 1918 A 927.

Under the code in Oklahoma, a single partner has no implied authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," or "to do any act which would make it impossible to carry on the ordinary business of the partnership." This would make invalid a sale by a single partner of the tools, building, business, etc., as well as the stock. Phillips v. Thorp (1903), 12 Okla. 617, 73 Pac. 268. Cal., Mont., N. Dak. and S. Dak. have similar statutes.

23 As has several times already been pointed out, one partner has ordinarily no implied authority to sell, assign, mortgage or transfer the partnership property in payment or security of his own private debt. That it is his own private debt, the creditor, of course, can usually not fail to know. If he knew that the property which was transferred to him in payment or security really belonged to the partnership, and that the other partners had not authorized the transfer, he, of course, would have ordinarily no pretense of right to hold it; but even if he did not know it, and took it in good faith, he nevertheless could ordinarily not hold it (money and negotiable instruments not now being considered), since usually no one can convey a better title to chattels than he himself has, even though he conveys to a *bona fide* purchaser for value. The latter, to be protected, must usually be able to show further that he was misled into taking the property by relying upon some conduct of the true owner which fairly justified him in believing that the transfer was authorized. See Cannon v. Lindsey (1887), 85 Ala. 198, 3 So. 676, 7 Am. St. R. 38; Farris v. Morrison (1899), 66 Ark. 318, 50 S. W. 693; Janney v. Springer (1889), 78 Iowa 617, 43 N. W. 461, 16 Am. St. R. 460; Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776; Todd v. Lorah (1874), 75 Pa. 155; Rogers v. Betterton (1894), 93 Tenn. 630, 27 S. W. 1017; Nichols v. Thomas (1915), 51 Okla. 212, 151 Pac. 847, L. R. A. 1916 B 908; Warren v. Martin (1888), 24 Neb. 273, 38 N. W. 849 carries the protection of the transferee very far.

What the remedy is, where the partnership property is thus wrongfully disposed of, is discussed in a later section. See § 331.

24 See Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631; Reid v. Hollinshead (1825), 4 B. & Cress. 867, 7 Dow. & Ry. 444; Willey v. Bank (1904), 141 Cal. 508, 75 Pac. 106.

§ 275. —— With respect of the partnership real estate, other rules apply in many cases. Not only may the land not be held for sale, but the technical difficulties, already noted,[25] respecting the execution of deeds by one partner, may prevent a completed transfer. If the partnership, on the other hand, is one organized to deal in land, it would be ordinarily within the implied authority of each partner to make *contracts* at least for the sale of such land, which equity would enforce against the partnership,[26] even if he would not be deemed authorized to make the complete *conveyance.*

Under the Uniform Partnership Act, where title to real property is in the partnership name any partner may convey title to such property by a conveyance executed in the partnership name, wherever the conveyance is within the actual or ostensible authority of the partner; while a conveyance of it in his own name, under the same circumstances, passes the equitable title to the land.[27]

§ 276. —— **Suits at law.**—Many cases arise in the ordinary conduct of the business, as for example in the collection of debts due to the partnership or in defending actions brought against it, in which the authority of any partner to institute, conduct or authorize legal actions involving the partnership affairs would be undoubted. Without such an authority a partner at times might be unable either to enforce his own rights or make his own defence. "A partner may sue in the name of himself and copartners without their consent," says Mr. Justice Lindley,[28] "but if he sues against their consent he must indemnify them against the costs. So one partner may defend

25 See *ante* §§ 263, 264.

26 See Rovelsky v. Brown (1891), 92 Ala. 522, 9 So. 182, 25 Am. St. R. 83, Mechem's Cas. 832, Gilm. Cas. 239.

27 Sec. 10 (1), (2). See this section in full in the Appendix.

28 1 Lindley on Partnership (Ewell's 2d Am. ed.), 271, (7th ed.) 307. See, also Kuhn v. Weil (1880), 73 Mo. 213; Ward v. Barber, 1 E. D. Smith (N. Y.), 423.

In Kuhn v. Weil, *supra,* the court, after stating the general rule as to the authority of each partner as agent for the partnership, said "Under this general authority the right of one partner in a mercantile firm, without consulting his copartners, to sue in the name of all the copartners for a debt due the firm, either in an ordinary action or one in attachment, cannot be questioned."

an action brought against the firm, indemnifying the firm against the consequences of so doing if he acts against the will of the other partners." If the firm as such is sued, as it may be under some statutes,[29] one partner may employ an attorney who may enter the appearance of the firm as such, though one partner has ordinarily no implied authority to appear for, or authorize the appearance of the other partners as individuals so as to subject them to personal judgment where they were not served with process and did not personally appear.[30]

For trespasses and other similar acts committed by one partner in attempting to enforce partnership demands by legal process, the firm will ordinarily be liable.[31] Even for the malicious acts of one partner, the others may be liable if they co-operate in them or subsequently ratify them; and while it has been held that one partner is not liable for a malicious prosecution carried on by his partner if he did not know of it or consent to it, and no benefit resulted to the firm,[32] there seems to be no good reason why a partner should not be liable for a malicious prosecution by his copartner in any case in which any other principal would be liable for the act of his general agent.[33]

§ 277. —— Suretyship and guaranty.—The business of the partnership, presumptively, is to be carried on,—its powers ex-

29 See *post*, § 337.

30 See Phelps v. Brewer (1852), 9 Cush. (63 Mass.) 390, 57 Am. Dec. 56; Haslet v. Street (1823), 2 McCord (S. C.), 310, 13 Am. Dec. 724, and note; Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Bennett v. Stickney (1845), 17 Vt. 531.

Compare Tomlinson v. Broadsmith [1896] 1 Q. B. 386 as to the authority of a managing partner.

31 See Harvey v. Adams (1875), 32 Mich. 472; Rolfe v. Dudley (1885), 58 Mich. 208, 24 N. W. 657; Kuhn v. Weil, *supra*.

32 Rosenkrans v. Barker (1885), 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169, Mechem's Cas. 405. See also, accord, Bernheimer v. Becker (1905), 102 Md. 250, 62 Atl. 526, 111 Am. St. R. 356, 3 L. R. A. (N. S.) 221; Kirk v. Garrett (1896), 84 Md. 383, 35 Atl. 1089; Marks v. Hastings (1892), 101 Ala. 165, 13 So. 297.

Compare Markley v. Snow (1904), 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685.

33 See McIlroy v. Adams (1877), 32 Ark. 315; Haney Mfg. Co. v. Perkins (1889), 78 Mich. 1, 43 N. W. 1073.

ercised, its credit extended—for the benefit of the partnership and not merely for the benefit or accommodation of third persons or of a single partner. One partner therefore may bind the firm upon a contract of suretyship, indemnity or guaranty for the partnership purposes and within the scope of its business;[34] but he has no implied authority to bind the firm by contracts of guaranty, indemnity or suretyship either for himself individually or for strangers to the firm.[35] The mere fact that the firm would derive an incidental or collateral benefit from the act, is not enough to change the rule;[36] though there undoubtedly may be cases in which the benefit would be so substantial, direct and immediate as to justify treating it as a

[34] Thus a partner in a firm of live stock dealers may agree that the firm will protect a bank which discounts their buying agent's drafts to pay for cattle purchased. First National Bank v. Rowley (1894), 92 Iowa 530, 61 N. W. 195; a partner in a firm of cattle dealers which has a large quantity of cattle which it is anxious to dispose of in some way, may bind his firm by agreeing that if a farmer will take them the firm will either buy them back later or guarantee him a profit, Jordan v. Miller (1881), 75 Va. 442; a partner in a mercantile firm may bind his firm by agreeing to indemnify a third person who accepts for the accommodation of the firm drafts by the firm upon such person, Wilkins v. Pearce (1848), 5 Denio (N. Y.) 541; a partner in a commercial firm may bind the firm by guaranteeing paper held by the firm upon a sale or discount thereof for firm purposes, McNeal v. Gossard (1897), 6 Okla. 363, 50 Pac. 159; a partner in a firm of bond and security dealers may bind the firm by guaranteeing payment by the maker of bonds sold by the firm: First Nat. Bank v. Farson (1919), 226 N. Y. 218, 123 N. E. 490.

[35] See Clarke v. Wallace (1891), 1 N. D. 404, 48 N. W. 339, 26 Am. St. Rep. 636, Mechem's Cas. 368; Andrews v. Planters' Bank (1846), 7 Smedes & Mar. (Miss.) 192, 45 Am. Dec. 300; Persons v. Oldfield (1912), 101 Miss. 110, 57 So. 417; New York, etc., Ins. Co. v. Bennett (1825), 5 Conn. 574, 13 Am. Dec. 109, and note; Avery v. Rowell (1883), 59 Wis. 82, 17 N. W. 875; Seeberger v. Wyman (1899), 108 Iowa 527, 79 N. W. 290 (one of a firm of lawyers undertaking to indemnify a surety upon a bond given in a suit); Osborne v. Thompson (1886), 35 Minn. 229, 28 N. W. 260; First National Bank v. Carpenter (1875), 41 Iowa 518.

Long acquiescence may preclude raising the objection, Bank of Monongahela v. Weston (1899), 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547.

[36] See Clarke v. Wallace, *supra*, (where in order to secure a firm debt of $1,300 the partner endorsed, in the firm name, the debtor's note for $5,000); Moore v. Stevens (1883), 60 Miss. 809.

partnership act. Beyond that, there must be actual authority, a course of dealing, or subsequent ratification, to hold the other partners liable.

Where the indorsement of the firm name appears as such upon what is clearly the individual note of the partner, it is warning of itself that the firm name was used for his accommodation, and the firm cannot be held unless it authorized it;[37] but where the instrument does not fairly disclose that it is the individual obligation of one partner, as where the note of the partner is made to the firm and indorsed in its name by that partner, though for his own benefit, a holder for value ignorant of the fraud may recover.[38]

§ 278. Of the authority of a managing partner.—It is entirely competent, and not at all uncommon, especially where the number of partners is large or other reasons of convenience or interest suggest it, for all of the partners to agree that one of them only shall undertake or be charged with the management and conduct of the business to the relief or exclusion of the others. (They might equally appoint a non-partner as a general managing agent, and with much the same purpose and result.) This agreement may be and often is express and formal, being frequently a term in the partnership articles;[39] it may

[37] See Tanner v. Hall (1845), 1 Pa. St. 417; Brown v. Pettit (1896), 178 Pa. 17, 35 Atl. 865; Smith v. Weston (1899), 159 N. Y. 194, 54 N. E. 38, 34 L. R. A. 723, 56 Am. St. R. 742.

One who sees that he is getting a firm acceptance as an accommodation to a third person, must be able to prove that all the partners assent to it, Bloom v. Helm (1876), 53 Miss. 21.

[38] See Redlon v. Churchill (1882), 73 Me. 146, 40 Am. Rep. 345; Sherwood v. Snow (1877), 46 Iowa 481, 26 Am. Rep. 155; Atlas Nat. Bank v. Savery (1879), 127 Mass. 75; Miller v. Consolidated Bank (1865), 48 Pa. 514, 88 Am. Dec. 475; Rollins v. Stevens (1850), 31 Me. 454, Gilm. Cas. 370. Compare Reed v. Bacon (1900), 175 Mass. 407, 56 N. E. 716.

[39] As, *e. g.*, in Kennedy v. Porter (1888), 109 N. Y. 526, 17 N. E. 426; Patterson v. Lily (1884), 90 N. Car. 82; Brooks v. Martin (1863), 69 U. S. (2 Wall.) 70, 17 L. ed. 732; Kimberly v. Arms (1888), 129 U. S. 512, 9 Sup. Ct. 355, 32 L. ed. 764; Callahan v. Heinz (1898), 20 Ind. App. 359, 49 N. E. 1073; Winship v. Bank of U. S. (1831), 30 U. S. (5 Pet.) 529, 8 L. ed. 216; Tate v. Clements (1878), 16 Fla. 339, 26 Am. Rep. 709; Baxter v. Rollins (1894), 90

also be informal and tacit, as where the others permit or encourage one partner more and more to assume the management to the degree of becoming in fact the managing partner.[40] Where the arrangement is express and third persons have notice of it, the authority of such a manager may be as general or as restricted as the parties see fit to make it; but secret limitations, while operative between the partners, can not affect the right of third persons to rely upon the ostensible arrangements and the usages in similar cases.[41]

§ 279. —— A general managing partner becomes, therefore, practically the possessor and exerciser of all the powers which any partner might otherwise have properly exercised in the conduct of the business.[42] His authority is coextensive with, but limited by, the nature and character of the business. If it is a non-trading partnership, that fact affects the range of the managing partner's authority. In such a partnership, he would therefore have ordinarily no implied authority to borrow money[43] or bind the partnership by negotiable instruments.[44]

Iowa 217, 57 N. W. 838, 48 Am. St. R. 432; by mutual consent: Fordyce v. Shriver (1886), 115 Ill. 530, 5 N. E. 87.

40 As, *e. g.*, in Salt Lake Brewing Co. v. Hawke (1901), 24 Utah 199, 66 Pac. 1058; Fulmer's Appeal (1879), 90 Pa. 143.

41 See Winship v. Bank of U. S., *supra;* Tate v. Clements, *supra.*

42 See Anderson v. Clayton (1911), 39 Utah 343, 117 Pac. 41 (contract by managing partner in real estate business to sell partnership land); Salt Lake Brewing Co. v. Hawke, *supra,* (borrowing money by partner in trading firm); Morse v. Richmond (1881), 97 Ill. 303, (giving note for money to pay for land bought in land-dealing firm); Waltham Piano Co. v. Pierson (1920), — Neb. —, 176 N. W. 364 (purchasing goods).

43 Managing partner in a trading partnership may borrow money on the credit of the partnership: Lindh v. Crowley (1883), 29 Kan. 756 (drug store); Salt Lake Brewing Co. v. Hawke, *supra,* (saloon-keepers); but not in a non-trading one: Davis v. Richardson (1871), 45 Miss. 499, 7 Am. Rep. 732; Prince v. Crawford (1874), 50 Miss. 344 (planting or farming).

44 Managing partner in trading firm may bind the partnership by promissory note: First Nat. Bank v. Grignon (1901), 7 Idaho 646, 65 Pac. 365; Citizens Commercial Bank v. Platt (1903), 135 Mich. 267, 97 N. W. 694 (renewing notes), but not in a non-trading one: Davis v. Richardson, *supra;* Prince v. Crawford, *supra.*

He may collect and pay debts, make and perform all proper partnership contracts, and the like; but he would have no more authority than any other partner to apply partnership property or credits to his own uses, and his authority to assign all the property for the benefit of creditors would be limited like that of any other partner.[45] Express or tacit consent, or subsequent ratification, may, of course, extend the range of the managing partner's authority,[46] even beyond the scope originally fixed for the partnership.

§ 280. Same subject—Several managers—Directors.—Instead of confiding the management of the partnership affairs to a single partner, as discussed in the preceding section, it may be confided to two or more. In the case of large partnerships, especially those, like joint stock companies, with transferable shares, the articles frequently provide for management by a board of managers or directors elected by the other partners, very much as in the case of a corporation.

These boards of directors or managers are also not infrequently provided with regular officers, such as president, secretary, and the like. They then assume much more closely the external appearance of corporations; but there is nothing in these provisions inconsistent with the law of partnership, and in some States such partnerships are not uncommon.[47] The form of organization of these partnerships is ordinarily not such

[45] May assign, if, and only if, it is necessary and other partners are absent where they can not be consulted: Williams v. Gillespie (1888), 30 W. Va. 586, 5 S. E. 210; Claflin v. Evans (1896), 55 Ohio 183, 45 N. E. 3, 60 Am. St. R. 686; Callahan v. Heinz (1898), 20 Ind. App. 359, 49 N. E. 1073; Forbes v. Scannell (1859), 13 Cal. 242.

[46] As to ratification of unauthorized act by taking benefits, see Johnston v. Bernheim (1882), 86 N. Car. 339.

[47] See People v. Coleman (1892), 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Willis v. Chapman (1896), 68 Vt. 459, 35 Atl. 459; Great Southern Hotel Co. v. Jones (1899), 177 U. S. 449, 20 Sup. Ct. 690, 44 L. ed. 482; Warner v. Beers (1840), 23 Wend. (N. Y.) 103; Spotswood v. Morris (1906), 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; Pettis v. Atkins (1871), 60 Ill. 454; Moore v. May (1903), 117 Wis. 192, 94 N. W. 45.

as to mislead persons dealing with them into the belief that the individual shareholders are authorized to act as agents for all.

§ 281. **Of the powers of a majority.**—The extent to which a majority of the partners may control the partnership affairs is perhaps not entirely settled by the authorities. It is clear, however, that no majority however large can, against the dissent of the minority, change the essential nature or extent of the partnership business as originally agreed upon, as, for example, to alter or amend the articles, reduce or increase the capital, embark upon a new business, change its agreed location, alter the share of a partner, admit a new member, and the like. If they attempt to do so, the dissenting partners will not be bound.[48] Neither can any majority deprive the minority of any rights given by the partnership agreement, or inherent in the nature of the partnership.

§ 282. —— But as to matters pertaining merely to the *manner* of conducting the business, and all questions concerning what are sometimes called the internal affairs of the partnership, it is equally clear that, if the articles do not determine them, the partners themselves must decide, and here in accordance with a well settled principle applicable to such cases to which, by implication, all have agreed, the majority will prevail. While one of two partners cannot, therefore, prevail against the expressed dissent of his partner, inasmuch as each has an equal voice,[49] it is held that a majority, where there are more than two, can prevail as to these incidental matters, even against the dissent of the minority, if they act fairly and in good faith.[50] A majority, however, will not, simply because it

[48] See Natusch v. Irving (1824), 2 Coop. temp. Cot. 358; Const v. Harris (1824), Turn. & R. 517; Abbott v. Johnson (1855), 32 N. H. 9; Zabriskie v. Railroad Co. (1867), 18 N. J. Eq. 178, 90 Am. Dec. 617.

Majority cannot expel a member unless by virtue of some provision in the articles, and then only if it acts fairly and in pursuance of the contract. Blisset v. Daniel (1853), 10 Hare 493, 19 Eng. Rul. Cas. 517.

[49] See *ante*, § 242.

[50] See Johnston v. Dutton (1855), 27 Ala. 245, Mechem's Cas. 371, Gilm. Cas. 391; Cotton Plant Oil Co. v. Buckeye Oil Co. (1909), 92 Ark. 271, 122 S. W. 658; Staples v.

is a majority, be permitted to oppress the minority or despoil them of their rights.[51]

The Uniform Partnership Act provides that "any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."[52]

Serious violation of the rule may doubtless be prevented by injunction,[53] and pertinacious disregard of it, at least, would doubtless be good ground for a dissolution.[54]

§ 283. Ratification of unauthorized acts.—The acts of one partner which may bind the partnership may be not only those which have been previously and expressly authorized, or which are implied from the existence of the relation, and the like, but may also be those which, though unauthorized when done, have subsequently been ratified by the other partners, either expressly or by implication. Liability may thus be imposed either in contract or in tort.[55] The occasions and conditions of ratification

Sprague (1883), 75 Me. 458; Peacocks v. Cummings (1863), 46 Pa. 434, Burd. Cas. 353; Clarke v. Railroad Co. (1890), 136 Pa. St. 408, 20 Atl. 562, 10 L. R. A. 238; Markle v. Wilbur (1901), 200 Pa. 457, 50 Atl. 204; Reirden v. Stephenson (1913), 87 Vt. 430, 89 Atl. 465, Ann. Cas. 1916 C 109; Reiser v. Johnston (1917), — Okla. —, 166 Pac. 723, L. R. A. 1918 A 924.

51 See Chicago Hansom Cab Co. v. Yerkes (1892), 141 Ill. 320, 30 N. E. 667, 33 Am. St. R. 315; Farmers' L. & T. Co. v. New York, etc., R. Co. (1896), 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. R. 689, 34 L. R. A. 76 (corporation cases, but the principle is the same). As to the proper attitude of the majority, see Wall v. London Assets Corp. [1898], 2 Ch. 469.

52 Sec. 18(h).

53 See *ante*, § 226.

54 See *post*, § 377.

55 See Porter v. Curry (1869), 50 Ill. 319, 99 A. Dec. 520, Mechem's Cas. 343; Maclean v. Dunn (1828), 4 Bing. 722; Holbrook v. Chamberlin (1874), 116 Mass. 155, 17 Am. Rep. 146; Davis v. Richardson (1871), 45 Miss. 499, 7 Am. Rep. 732; Enterprise Oil & Gas. Co. v. Transit Co. (1896), 172 Pa. 421, 33 Atl. 687, 51 Am. St. R. 746; Rock v. Collins (1898), 99 Wis. 630, 75 N. W. 426, 67 Am. St. R. 885; Clark v. Hyman (1880), 55 Iowa 14, 7 N. W. 386, 39 Am. Rep. 160; McGahan v. Rondout Bank (1894), 156 U. S. 218, 15 Sup. Ct. 347, 39 L. ed. 403; Hull v. Young (1888), 30 S. Car. 121, 8 S. E. 695, 3 L. R. A. 521 (ratification of execution of note

in these cases are the same as in any other case of agency—the firm or the other partners being principal, and the partner acting being agent,—and as the reader is assumed to be familiar with this subject from his previous study of agency, no extended discussion of it will be attempted here.[56]

It is worth while, however, to recall that in order that there may be ratification the act in question must have been done by the partner as agent for the partnership; that the partners alleged to have ratified must have had full knowledge of all of the material facts concerning the act to be ratified; and that where ratification is sought to be predicated upon the receipt or acceptance of the alleged benefits of the act, such acceptance must have taken place under circumstances fairly manifesting a consenting and approving mind. The mere fact that benefits may have resulted to the partnership is not, occasional statements to the contrary notwithstanding, of itself enough to establish ratification,[57] however much it might at times justify a recovery in *quasi* contract.

As in other cases, a subsequent ratification could not cut off intervening rights.[58]

under seal); Hurt v. Clarke (1876), 56 Ala. 19, 28 Am. Rep. 751; Levi v. Latham (1884), 15 Neb. 509, 19 N. W. 460, 48 Am. Rep. 361; Fillans v. Greenfield (1917), 39 S. Dak. 226, 164 N. W. 63.

56 See 1 Mechem on Agency, §§ 376 *et seq.*

57 See Dawson v. Elrod (1899), 105 Ky. 624, 49 S. W. 465, 20 Ky. Law R. 1436, 88 Am. St. R. 320, Mechem's Cas. 380.

58 See Coleman v. Darling (1886). 66 Wis. 155, 28 N. W. 367, 57 Am. Rep. 253.

CHAPTER XI.

WHO ARE BOUND BY THE ACTS OF A PARTNER.

§ 284. In general.—The question, who are bound by the acts of a partner, presents several different aspects. It is the question of the rights and remedies of third persons based upon the act of one or more partners. It may arise under varying circumstances, as, for example, where one partner has assumed to bind the firm, but it is claimed that his act was unauthorized; where he apparently acts for himself alone, but it is claimed that the firm was the real party; where certain persons were ostensibly the only partners, but it is claimed that others were also actually in the firm; where the act was the making of a contract; where it was the commission of a tort, and the like. The

most appropriate classification of the subject for our purpose is probably that used in Agency, namely, the liability—1. In contract. 2. In tort.

I. In Contract.

§ 285. All partners bound by authorized contracts.—It has been seen in an earlier chapter that each partner is ordinarily the agent of the partnership with authority conferred, either expressly or impliedly, to bind the partners as their agent. It follows, therefore, that whenever a partner makes a contract for the partnership and in the partnership name, within the limit of his express or implied authority as a partner, he binds all the members of the partnership upon it. It is immaterial, in this connection, whether the other partners knew of the act or not; or, in the case of implied powers, whether they had previously consciously consented to it or not; or, if it was within the scope of the business, whether it was, or was not, a violation of their private agreement between themselves. The only question, so far as the liability of the partners to a third person, ignorant of their private agreements, is concerned, is whether the contract was, in contemplation of law, within the authority of the partner; if it was, then every partner is bound by it.[1]

§ 286. —— But while each partner is thus bound to answer, and out of his individual estate if necessary, for the non-performance of the partnership contracts, it does not follow that, in becoming a party to a partnership contract, he, at the same time, enters into a separate individual contract in identical terms. A partnership contract to employ a particular person does not result in a separate contract by each partner individually to employ that person; and a contract by which a partnership, upon a sale of its business, agrees not to resume business within a certain period, has been held not to bind an individual partner to refrain from doing so,[2] though it would be

[1] See Sweet v. Wood (1893), 18 R. I. 386, 28 Atl. 335, Mechem's Cas. 332; Farmers' Ins. Co. v. Malone (1895), 45 Neb. 302, 63 N. W. 802.

[2] See Streichen v. Fehleisen (1900), 112 Iowa 612, 84 N. W. 715, 51 L. R. A. 412. A similar holding has been made in corporations: Hall's Safe Co. v. Herring-Hall-

otherwise if the contract in terms covered both the partnership and the several members thereof.[3] It is for the partnership obligation only that each partner usually assumes liability.

§ 287. Dormant, secret and nominal partners bound also.— This liability involves every one who was, at the time of the contract, either actually or nominally a partner in the firm. A nominal partner is, of course, liable to those who relied upon him, having been held out as a partner;[4] and if one were then actually a partner he is likewise liable though the other party did not then know of it, or though such partner has since retired from the firm. A secret or dormant partner is therefore liable, when discovered, upon partnership contracts, to the same extent as though he had been an ostensible partner. The fact that the other party dealt with the ostensible partner or partners, and gave credit to them in ignorance of the existence of the secret or dormant partner, is not an election to hold the ostensible partners only, when the dormant or secret partners are afterwards discovered. And the dormant or secret partners are bound not only by those acts which were actually authorized, but also, like other partners, by those acts which were apparently authorized, or were within the scope of the business as actually carried on.[5]

Marvin Safe Co. (1906), 76 C. C. A. 495, 146 Fed. 37, 14 L. R. A. (N. S.) 1182.

[3] See Pittsburg V. F. & C. Co. v. Klingelhofer (1904), 210 Pa. 513, 60 Atl. 161, where the agreement was "The said parties further agree that they will not, nor shall any member of said parties concerned, engage in a similar business to that now carried on by said parties," etc.

[4] As to the liability of the nominal partner, or liability by estoppel, see *ante*, § 99 *et seq.*

[5] See Winship v. United States Bank (1831), 5 Peters (U. S.) 529, 8 L. ed. 216, Gilm. Cas. 356; Brooke v. Washington (1852), 8 Gratt. (Va.) 248, 56 Am. Dec. 142, and note, Gilm. Cas. 318; Richardson v. Farmer (1865), 36 Mo. 35, 88 Am. Dec. 129, Gilm. Cas. 322; Gavin v. Walker (1885), 82 Tenn. (14 Lea) 643; Callender v. Robinson (1880), 96 Pa. 454; Mohawk Nat. Bank v. Van Slyck (1883), 29 Hun (N. Y.) 188, Burd. Cas. 396; Grosvenor v. Lloyd (1840), 1 Metc. (Mass.) 19, Gilm. Cas. 348; Elmira Iron Rolling Mill Co. v. Harris (1891), 124 N. Y. 280, 26 N. E. 541, Mechem's Cas. 987, Burd. Cas. 398, Gilm. Cas. 349; Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. 695, 34 Am. St. R. 110, Mechem's Cas. 383; Bromley v. Elliott (1859), 38 N. H. 287, 75 Am.

Dormant and secret partners will also be bound by the acts of the ostensible partners, even in those cases wherein the consent of all partners is necessary, if the other party was ignorant of their existence and acted in good faith. Interests in and claims upon the common property, fairly acquired in good faith upon the basis that it was the sole property of the ostensible partner or partners, will ordinarily be effective against the dormant partners also, since they have caused or permitted it to so appear.[6]

§ 288. Liability of the firm upon contracts made by one partner in his own name.—As has been seen, when a firm name has been adopted, it ought always to be used in partnership transactions; but, through inadvertence or error, contracts may be made in the individual name of one partner which were designed by one or both parties to be the contracts of the firm. The question, therefore, arises, when may a contract in the name of one partner be shown to be the contract of the firm? The solution of this question is affected both by the nature of the transaction and by the intention of the parties. Thus:

1. The contract may be, (*a*) a simple contract not negotiable, (*b*) a negotiable instrument, or (*c*) a contract under seal.

2. The existence of the partnership may, at the time of making the contract, have been (*a*) known, or (*b*) unknown by the other party.

3. The parties, or one of them, may have intended to bind

Dec. 182; Swan v. Steele (1806), 7 East 210, Ames' Cas. 500; Robinson v. Wilkinson (1817), 3 Price 538, Burd. Cas. 396; Bisel v. Hobbs (1843), 6 Blackf. (Ind.) 479, Gilm. Cas. 321. Not so, where the dormant partner had withdrawn and the partnership had been dissolved before the contract in question was made. Pitkin v. Benfer, *supra*.

[6] See Locke v. Lewis (1878), 124 Mass. 1, 26 Am. Rep. 631, Ames' Cas. 584 (sale by ostensible partner in payment of his own debt); Reid v. Hollinshead (1825), 4 B. & Cress. 867, 7 Dow. & Ry. 444, Ames' Cas. 29 (pledge by the ostensible partner); Willey v. Bank (1904), 141 Cal. 508, 75 Pac. 106 (set-off of firm claim against claim of ostensible partner); Callender v. Robinson (1880), 96 Pa. 454 (execution levy by creditor who relied in giving the credit on apparent ownership of ostensible partner). See, also, Warren v. Martin (1888), 24 Neb. 273, 38 N. W. 849.

(a) the individual partner, or *(b)* the firm. The two latter groups are subsidiary, and may be considered under the first.

§ 289. Same subject—Known partnership—Simple contracts in name of one partner.—Where a person is known to be acting as partner for a known partnership, the presumption is that he intended to bind the partnership and not himself only, and where such was the intention the partners and not the single partner will be bound. This presumption, however, may be rebutted, and if it appears that the other party has knowingly dealt with the partner as an individual, and that the latter has pledged his individual credit, the partner alone will be bound and not the firm. And if the transaction were really an individual one, the firm does not become liable because it afterwards received the benefit of the transaction. Thus, if money were loaned or goods sold to one partner as an individual, the firm does not become liable to the lender or the seller simply because the money or the goods came to the use of the firm. The liability of the firm is to the partner upon whose credit the money or goods were obtained; and that partner must answer to those from whom they were obtained. Whether the credit was extended to the partnership as such, or to the partner individually, is a question to be determined in view of all of the facts and circumstances of the case.[7]

§ 290. —— Where the contract was originally made with one partner only, there might later be an express or implied nova-

[7] See Tyler v. Waddingham (1890), 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Peterson v. Roach (1877), 32 Ohio St. 374, 30 Am. Rep. 607, Gilm. Cas. 314; Adams v. Hardware Co. (1887), 78 Ga. 485, 3 S. E. 430; Thornton v. Lambeth (1889), 103 N. C. 86, 9 S. E. 432; National Bank v. Cringan (1895), 91 Va. 347, 21 S. E. 820; Brown v. Fresno Raisin Co. (1894), 101 Cal. 222, 35 Pac. 639; Hubenthal v. Kennedy (1888), 76 Iowa 707, 39 N. W. 694; Goodenow v. Jones (1874), 75 Ill. 48; North Penn. Coal Co.'s Appeal (1863), 45 Pa. 181, 84 Am. Dec. 487. The firm is not liable upon a note given by one partner for his share of the capital. National Bank v. Cringan, *supra*. Same effect: Bannister v. Miller (1895), 54 N. J. Eq. 121, 701, 32 Atl. 1066, 37 Atl. 1117; McLinden v. Wentworth (1881), 51 Wis. 170, 8 N. W. 118, 192. So where one partner borrows money on his own note to reimburse another partner for money advanced to the firm, the firm is not liable. Redenbaugh v. Kelton (1895), 130 Mo. 558, 32 S. W. 67.

tion, or what is sometimes loosely called "adoption" of it, which would substitute the liability of the partnership for that of the single partner who made it.[8] So, if the contract, though in writing, (not under seal or negotiable) was originally made for and by the authority of the partnership, the partnership, by the weight of authority, could still be held upon it, the fact that it was made in the name of one partner only not being conclusive evidence of an intention to bind him alone.[9]

§ 291. ——Note of one partner.—Similar questions arise where a creditor takes the note or other similar obligation of one partner for a partnership debt.

If, at the time the debt is contracted, the note or other obligation of one partner is taken, and credit given exclusively to him, the firm will not be bound;[10] but if credit were given to the firm, the note or other obligation (if not given as the note of the partnership[11]) will be deemed to have been taken as collateral security or otherwise, and the firm may still be held, not upon the note[12] but upon the original claim. To whom the credit was given is here, as in the preceding section, a question of fact to be determined in view of all the circumstances.[13]

8 See the discussion of a somewhat similar question under corporations not yet organized, in 1 Mechem on Agency (2d ed.), § 382. In partnership, see Reynolds v. Swain (1839), 13 La. 193; Penn v. Kearny (1869), 21 La. Ann. 21; Marks v. Chumos (1910), 82 Kan. 562, 109 Pac. 397 (which goes on theory that partner in whose name a lease was taken would be a trustee for the partnership and the other partner would be liable upon it); Bodey v. Cooper (1896), 82 Md. 625, 34 Atl. 362 (which goes upon ground that assent of other partner would bind him for rent under a lease under seal made by one partner only but in firm name).

9 See 2 Mechem on Agency (2d ed.), §§ 1712-1716.

10 See Holmes v. Burton (1837), 9 Vt. 252, 31 Am. Dec. 621, Gilm. Cas. 312.

11 See *post*, § 296.

12 See Farmers Bank v. Bayless (1865), 35 Mo. 428.

13 See Hoeflinger v. Wells (1879), 47 Wis. 628, 3 N. W. 589; Maffet v. Leuckel (1880), 93 Pa. 468, Gilm. Cas. 317; Smith v. Collins (1874), 115 Mass. 388; Mills v. Riggle (1911), 83 Kan. 703, 112 Pac. 617, Ann. Cas. 1912 A 616; Beckwith v. Mace (1905), 140 Mich. 157, 103 N. W. 559. In Hoeflinger v. Wells, *supra*, where the question was whether plaintiff could recover of

If the obligation of one partner, *e. g.*, his promissory note, be taken for a previously created partnership debt, the effect depends upon the intention. Such a note may be taken as payment of the firm debt, and if it is so taken the firm debt is gone; but in order to discharge the firm, according to the prevailing rule, the evidence must be clear that it was so taken in satisfaction, for this will not be presumed from the mere fact of the taking, and in the absence of such evidence the firm will still be bound upon the debt.[14]

§ 292. Same subject—Unknown partnership.—In those cases already considered in which it is held that the creditor has recourse against one partner only, it is because it is determined that the creditor has elected to give credit to such partner alone. But an election involves the opportunity of choice—of choosing between the credit of the firm and that of the individual part-

the firm of Stafford & Wells for money loaned upon Stafford's note, the court says: "If upon the trial the plaintiff can show that the money was borrowed for the firm, that he was at the time advised that it was for the firm, and that he loaned it to the firm and upon its credit, then the mere taking of the individual note of the one partner for the money so loaned will not defeat the action. The taking of such note may be evidence tending to show that the money was not loaned to the firm, and that the sole credit was given to Stafford; but it is not conclusive of that fact; and if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same."

In North Penn. Coal Co.'s Appeal (1863), 45 Pa. 181, 84 Am. Dec. 487, the obligation given by the partner was a bond, apparently under seal, to which class of instruments this rule ordinarily does not apply. See *post*, § 293.

14 Burdett v. Greer (1908), 63 W. Va. 515, 60 S. E. 497, 129 Am. St. R. 1014, 15 Ann. Cas. 935, 15 L. R. A. (N. S.) 1019, with elaborate note; Craswell v. Cattle Co. (1910), 148 Iowa 9, 126 N. W. 908; Reyburn v. Mitchell (1891), 106 Mo. 365, 16 S. W. 592, 27 Am. St. R. 350. Compare Crooker v. Crooker (1863), 52 Me. 267, 83 Am. Dec. 509. The note of one would be a good consideration for a promise to release the others: Luddington v. Bell (1879), 77 N. Y. 138, 33 Am. Rep. 601; Stephens v. Thompson (1855), 28 Vt. 77.

ner,—and this opportunity of choice can only exist where the creditor knew that there was a partnership at the time that he gave credit. If he did not then know of the existence of the partnership, it is obvious that a different question is presented, but it is, at the same time, a question already considered in Agency. It is another phase of the liability of an undisclosed principal—the partnership—for the acts and contracts of his agent—the partner. As to this, it has been seen that an undisclosed principal when discovered is, in general, bound by the simple contracts of his agent, although at the time the other party gave credit to the agent alone, supposing him to be the principal. Two exceptions to this rule were found to prevail: 1. That the principal cannot be held where he had been previously led by the creditor's conduct to settle with the agent upon the assumption that the agent had paid such creditor; and 2. That the principal cannot be held where, after his discovery, the creditor has elected to give credit to the agent alone.[15] This rule applies in the case of partnerships, and subject to the exceptions named, the undisclosed partners are liable, when discovered, upon the simple contracts made really in behalf of the firm though ostensibly by one partner only.[16] This rule that the creditor may hold the undisclosed or dormant partners liable confers a right but does not impose a duty; that is, the creditor has usually his option to sue all or only the one with whom he dealt—he *may* sue all, but is not *obliged* to do so.[17]

§ 293. Same subject—Contracts under seal.—In case the contract or obligation executed by the single partner was a bond, deed or other instrument under seal, different rules apply for technical reasons. In such a case, where the common-law incidents of a seal still exist, all previous obligations if any are usually deemed to be merged in the bond or deed, and only

[15] See 2 Mechem on Agency, §§ 1729-1772.

[16] See Beckham v. Drake (1841), 9 Mees. & Wels. 79; Reynolds v. Cleveland (1825), 4 Cowen (N. Y.) 282, 15 Am. Dec. 369; Griffith v. Buffum (1850), 22 Vt. 181, 54 Am. Dec. 64, Mechem's Cas. 385.

[17] Cleveland v. Woodward (1843), 15 Vt. 302, 40 Am. Dec. 682, Mechem's Cas. 388.

those persons who are named as parties to it can sue or be sued; hence if one partner gives his own sealed obligation, or enters into a contract under seal, the other partners cannot be held at law, either upon the instrument itself or upon the consideration, by showing the contract was really made in behalf of the firm or that it received the benefit of it,[18] except where the seal can be regarded as surplusage.[19] But if there was originally a partnership obligation, which at law was deemed to be merged in the specialty executed by one partner, equity may at times, on the insolvency of that partner, allow relief against the others who, but for such merger, would be liable.[20]

§ 294. **Same subject—Judgment against one partner.**—A judgment against one partner alone for a partnership debt, by the common law, discharges the other partners whether ostensible or secret. The judgment is a higher security which ordinarily merges the lower; and, besides, the liability of the partners is a joint one, upon which they cannot usually be separately sued.[21]

This effect of a judgment as a merger has been altered in several States by statute,[22] and statutes in several States make

18 See Tom v. Goodrich (1807), 2 Johns. (N. Y.) 213; United States v. Astley (1819), 3 Wash. (U. S. C. C.) 508 (but see U. S. v. Lyman (1818), 1 Mason U. S. C. C. 482, 506); North Penn. Coal Coal Co.'s Appeal (1863), 45 Pa. St. 181, 84 Am. Dec. 487; Williams v. Gillies (1878), 75 N. Y. 197, Burd. Cas. 290.

In Faris v. Cook (1901), 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600, 23 Ky. L. R. 328, it was held that the other partners could be held upon a bond signed by one only upon proof that its execution in that form was by the authority of the others and on their account. It was, for the time being, making that partner's name the firm name.

19 See as to this, *ante*, § 263.

20 As to a liability in equity, see Alexander v. Alexander (1888), 85 Va. 353, 7 S. E. 335, 1 L. R. A. 125; Niday v. Harvey (1852), 9 Gratt. (Va.) 454.

21 See Mason v. Eldred (1867), 73 U. S. (6 Wall.) 231, 18 L. ed. 783, Mechem's Cas. 433, Burd. Cas. 388, Gilm. Cas. 281; Candee v. Clark (1851), 2 Mich. 255; Ward v. Johnson (1816), 13 Mass. 148; Smith v. Black (1822), 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Wann v. McNulty (1845), 7 Ill. 355, 43 Am. Dec. 58; Suydam v. Barber (1858), 18 N. Y. 468, 75 Am. Dec. 254. See, also, *post*, §§ 210, 211.

22 See Mason v. Eldred, *supra;* Tibbetts v. Shapleigh (1881), 60 N.

partnership obligations joint and several.[23] The Uniform Partnership Act does not make this change.[24]

Moreover, it has been held in a number of States, even in the absence of a statute, that where the debtors, at the time of the action, reside in different States, so that no one court by its process can acquire jurisdiction over all of them, a judgment against part in a court having jurisdiction over them, will, if unsatisfied, be no bar to a later judgment against the others in a court having jurisdiction over them.[25]

§ 295. Contracts made in individual names of all the partners.—Where a firm name has been adopted, it should be used in partnership transactions, and, as a rule, the partnership cannot be bound as such by any other name. But this rule is not inflexible, and between themselves partners may adopt such names as they please. They may also do this as to creditors if the transaction is really a partnership transaction and for its benefit. Thus, though an obligation signed, not in the firm name, but in the individual names of all of the partners, is *prima facie* an individual transaction and not a partnership one, it may be shown to be a partnership transaction not only between the partners themselves, but also in favor of the obligee and against other creditors of the firm.[26] Parol evidence is admissible for

H. 487; Odom v. Denny (1860), 82 Mass. (16 Gray) 114; Campbell v. Steele (1849), 11 Pa. St. 394; Bonesteel v. Todd (1861), 9 Mich. 371, 80 Am. Dec. 90; Wood v. Watkinson (1846), 17 Conn. 500, 44 Am. Dec. 562.

[23] In some of the states, the general statutes making the liability on joint contracts joint and several, have been held not to apply to partnership debts; in others, *contra*. See *post*, § 308.

[24] Sec. 15.

[25] See Rand v. Nutter (1868), 56 Me. 339; Yoho v. McGovern (1884), 42 Ohio St. 11; Tibbetts v. Shapleigh (1881), 60 N. H. 487; Olcott v. Little (1838), 9 N. H. 259, 32 Am. Dec. 357; Cox v. Maddux (1880), 72 Ind. 206; Merriman v. Barker (1889), 121 Ind. 74, 22 N. E. 992; Brown v. Birdsall (1859), 29 Barb. (N. Y.) 549; Hitchcock v. Frackelton (1898), 116 Mich. 487, 74 N. W. 720; even though note was made in a state where the judgment would be a bar: Wiley v. Holmes (1859), 28 Mo. 286, 75 Am. Dec. 126. Foreign judgment no bar: Eastern Townships Bank v. Beebe (1880), 53 Vt. 177, 38 Am. Rep. 665.

[26] See Berkshire Woolen Co. v. Juillard (1879), 75 N. Y. 535, 31 Am. Rep. 488, Mechem's Cas. 389,

this purpose: it does not contradict the writing, nor violate the rule that no one but a party to it can be held upon a negotiable instrument.[27]

§ 296. Contracts where firm does business in name of one partner.—It is not uncommon, as has been seen, for a partnership to do business in the name of a single partner, and contracts made in that name for the partnership will bind all members.[28] If that partner carries on no individual business separate from that of the firm, contracts made in such name will be presumed to bind the partnership; if he does carry on a separate business, no such presumption arises, and the person who would charge the partnership upon a contract made in the name of such partner must show that it was intended to bind the partnership.[29]

Gilm. Cas. 156; Mix v. Shattuck (1878), 50 Vt. 421, 28 Am. Rep. 511; Freeman v. Campbell (1880), 55 Cal. 197; Iddings v. Pierson (1884), 100 Ind. 418; Warriner v. Mitchell (1889), 128 Pa. St. 153, 18 Atl. 337; Carson v. Byers (1885), 67 Iowa 606, 25 N. W. 826; Dreyfus v. Union Bank (1896), 164 Ill. 83, 45 N. E. 408, Burd. Cas. 139; Howell v. Moores (1889), 127 Ill. 67, 19 N. E. 863; Rouse v. Wallace (1897), 10 Colo. App. 93, 50 Pac. 366; Davis v. Turner (1903), 56 C. C. A. 669, 120 Fed. 605; *In re* Kuhn (1917), 241 Fed. 935; Purvis v. Butler (1891), 87 Mich. 248, 49 N. W. 564.

So although the firm name is "C. W. Rollins," a note made in the course of the business but signed "C. W. Rollins & Co.," may bind the partnership. Baxter v. Rollins (1894), 90 Iowa 217, 57 N. W. 838, 48 Am. St. R. 432.

In Colwell v. Weybossit Bank (1888), 16 R. I. 288, 15 Atl. 80, 17 Atl. 913, it was shown that it was the custom of the partners to borrow money on notes signed by one partner and endorsed by the other. *Held*, to be partnership obligations.

But if the note was not in fact the obligation of the partnership the fact that all the partners signed it as individuals will not make it such. Lill v. Egan (1878), 89 Ill. 609.

27 See Dreyfus v. Union Bank, *supra*.

28 See Rumsey v. Briggs (1893), 139 N. Y. 323, 34 N. E. 929; Gavin v. Walker (1885), 82 Tenn. (14 Lea) 643; Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. 695, 34 Am. St. R. 110, Mechem's Cas. 383; Baxter v. Rollins (1894), 90 Iowa 217, 57 N. W. 838, 48 Am. St. R. 432.

29 See United States Bank v. Binney (1828), 5 Mason (U. S. C. C.), 189; Yorkshire Banking Co. v. Beatson (1880), L. R. 5 C. P. Div. 109, Burd. Cas. 141, Gilm. Cas. 157, 317; Bank of Rochester v. Monteath (1845), 1 Denio (N. Y.) 402, 43 Am. Dec. 681.

§ 297. Particular contract made by firm in name of one partner.—It is also possible that while the name of one partner was not regularly used as the firm name, it was so used upon a particular occasion with the authority and consent of all the partners. It may thus become *pro hac vice* the firm name, and all the partners will be charged by its use.[30] It may also be the fact that the firm had no regular name at all, but used the name of one or the other of the partners as the occasion might suggest or convenience require.[31] Parol evidence is competent to show such a fact.

§ 298. Contracts where there are two firms of same name with common partner.—Cases occur, though they are comparatively rare, where two firms are doing business under the same name in the same locality, and having one or more but not all of their members in common. It was thought at one time that where a contract was made in such firm name by the common partner, and the other party did not know for which of the firms he assumed to act, either firm could be held at the option of the other party, but that both could not be held. The true rule seems to be, however, that such cases stand upon no peculiar ground, but that that partnership only is to be held which by the facts and circumstances is pointed out as the one for which the partner acted.[32] The partners may, by their con-

30 See Jacks v. Greenhaw (1912), 105 Ark. 615, 152 S. W. 160; National Exch. Bank v. Wilgus (1894), 95 Ky. 309, 25 S. W. 2, 15 Ky. L. R. 763; Carter v. Mitchell (1893), 94 Ky. 261, 22 S. W. 83, 15 Ky. L. R. 53; Thomas v. Hardsocg (1908), 137 Iowa 597, 115 N. W. 210 (note made in name of managing partner). There is nothing in Farmers Bank v. Bayless (1865), 35 Mo. 428, contrary to this. The court pointed out that there was no claim or proof on this point.

31 See Barcroft v. Haworth (1870), 29 Iowa 462; Seekell v. Fletcher (1880), 53 Iowa 330, 5 N. W. 200; Dockery v. Faulkner (1907), 101 S. W. 501 (Tex. Civ. App.).

32 See Hastings National Bank v. Hibbard (1882), 48 Mich. 452, 12 N. W. 651, Mechem's Cas. 392; Fosdick v. VanHorn (1884), 40 Ohio St. 459; Swan v. Steele (1806), 7 East 210. In Hastings National Bank v. Hibbard, *supra*, it appeared that a firm of three partners, engaged in operating a particular flouring mill, temporarily arranged

duct, lead him to believe that he is dealing with one of the firms rather than the other, and where they do so their personal responsibility may be determined accordingly.[33]

§ 299. Contracts where same persons constitute different firms with different names.—The same persons may compose different partnerships with different names. They are all, of course, liable for the debts of each partnership, but their rights and liabilities among themselves may differ in the several partnerships, and the distribution of the assets of the several firms may be governed by different considerations.[34]

§ 300. Liability of partner who exceeds his authority.—A partner, like other agents, may incur individual liability by assuming to act without sufficient authority. In such cases he

to take in another partner and run an additional mill as another firm. Both firms, however, had the same name and used the same letterheads, upon which the names of all four partners were printed, but the business of the two mills was kept distinct. The second mill kept no bank account, but borrowed from the first when necessary, and kept its account with it. One of the original partners made a note in the firm name and discounted it at the plaintiff's bank. In an action by the bank the jury found that the bank relied exclusively upon the credit of the original partners. It was not claimed that the money was borrowed or used for the benefit of the later firm. It was therefore held that the additional partner could not be held liable.

33 See Adams v. Brown (1865), 16 Ohio St. 75. Where there are two firms with a common partner and much of the time doing business under the same name, the creditor may recover from that firm with which, in the exercise of ordinary prudence, he was justified in believing he was dealing: Baker v. Nappier (1856), 19 Ga. 520. A partner, not in the firm actually concerned, but in the other, cannot be held unless the plaintiff, exercising ordinary prudence, has reasonably been led to believe that he was dealing with the other. Cushing v. Smith (1875), 43 Tex. 261. Where a firm carries on business in one town, and one of the partners has a separate business in another town, the firm cannot be held for goods supplied to the single partner at the latter place, if they were not in fact purchased for the firm and the seller had no reason to think they were except that they were ordered in the firm name. Samstag v. Ottenheimer (1916), 90 Conn. 475, 97 Atl. 865.

34 See *post*, § 461.

See also Second Nat. Bank v. Burt (1883), 93 N. Y. 233.

may make express representations as to his authority, and he may likewise make an implied representation by assuming to act as a partner. For a breach of either of these representations he may be held liable to third persons who are injured by reason of his undertaking to bind the firm when he had no authority so to do. Whether he can be held upon the very contract which he has made without authority, depends upon whether the contract contains apt words to charge him personally. His liability in these cases is ordinarily made to depend upon the familiar rules which make an agent liable who has exceeded his authority or who has assumed to act for a principal having no legal existence.[35]

There is, however, less occasion to resort to these rules in partnership cases, because a partner normally expects to bind himself as one of the contracting parties on every obligation he incurs for the partnership, while the ordinary agent normally does not intend to bind himself at all but only his principal. If it be assumed that the firm name is always the name of the partner who uses it, for the purposes of that transaction,[36] then he would always be bound (unless the contrary were stipulated) even though, for lack of authority, he did not bind his copartner also by the same name.

II. In Tort.

§ 301. Firm liable for torts of one partner committed in course of business.—The liability of the partnership for the torts of one partner rests upon the same foundation as the liability of a principal for the torts of his agent, which has been

[35] See Mechem on Agency (2d ed.), §§ 1363, 1383; Taft v. Church (1895), 162 Mass. 527, 39 N. E. 283; North Star Co. v. Stebbins (1893), 3 So. Dak. 540, 54 N. W. 593; Silvers v. Foster (1872), 9 Kan. 56; Gunderson v. Hasterlick (1902), 100 Ill. App. 429; Hubbard v. Matthews (1873), 54 N. Y. 43, 13 Am. Rep. 562; Weeks v. Rake Co. (1877), 58 N. H. 101 (on sealed instrument executed without adequate authority); Bitzer v. Shunk (1841), 1 W. & S. (Pa.) 340, 37 Am. Dec. 469 (confession of judgment without adequate authority).

[36] See Haskins v. D'Este (1882), 133 Mass. 356; Bonneau v. Strauss (1919), — Okla. —, 179 Pac. 10, 4 A. L. R. 255 and note (liable on the contract).

already considered. Thus, the partners are liable in a civil action for the negligence of one partner, committed in the transaction of partnership business; as, for example, where one of a firm of lawyers or physicians causes loss to a client or a patient by a want of professional skill or a failure to use due care or diligence.[37]

This liability of the partners is not, however, confined to actions based upon a partner's negligence; they are liable also for his trespass, fraud, deceit, misrepresentation or malice, if committed in the course of the partnership business and in furtherance of its interests; as, for example, where one partner in the prosecution of the partnership business wrongfully seizes the property of a third person, or institutes malicious prosecutions, or is guilty of a libel.[38] A greater liability still may also

[37] See Hess v. Lowrey (1889), 122 Ind. 225, 23 N. E. 156, 17 Am. St. R. 355, Mechem's Cas. 400; Hyrne v. Erwin (1885), 23 S. C. 226, 55 Am. Rep. 15; Collier v. McCall (1887), 84 Ala. 190, 4 So. 367; Haley v. Case (1886), 142 Mass. 316, 7 N. E. 877; Bucki v. Cone (1889), 25 Fla. 1, 6 So. 160; Whittaker v. Collins (1885), 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Linton v. Hurley (1859), 80 Mass. (14 Gray) 191; Hobbs v. Chicago Packing Co. (1896), 98 Ga. 576, 25 S. E. 584, 58 Am. St. R. 320, Burd. Cas. 349 (conversion); Monmouth College v. Dockery (1911), 241 Mo. 522, 145 S. W. 785.

[38] See Strang v. Bradner (1884), 114 U. S. 555, 29 L. ed. 248, Mechem's Cas. 413; Stanhope v. Swafford (1890), 80 Iowa 45, 45 N. W. 403; Myers v. Lewis (1917), 121 Va. 50, 92 S. E. 988; Wolf v. Mills (1870), 56 Ill. 360, Gilm. Cas. 397; Morehouse v. Northrop (1866), 33 Conn. 380, 89 Am. Dec. 211; Locke v. Stearns (1840), 1 Metc. (Mass.) 560, 35 Am. Dec. 382, Mechem's Cas. 422; Chester v. Dickerson (1873), 54 N. Y. 1, 13 Am. Rep. 550, Mechem's Cas. 38; Jacobs v. Shorey (1868), 48 N. H. 100, 97 Am. Dec. 586, Mechem's Cas. 164; Brundage v. Mellon (1895), 5 N. Dak. 72, 63 N. W. 209, Burd. Cas. 348; Haney Mfg. Co. v. Perkins (1889), 78 Mich. 1, 43 N. W. 1073, Gilm. Cas. 396; Lathrop v. Adams (1882), 133 Mass. 471, 43 Am. Rep. 528, Mechem's Cas. 425.

The individual property of an innocent partner is not liable to attachment for a firm debt fraudulently contracted by a copartner. Jaffrey v. Jennings (1894), 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645, Mechem's Cas. 416. No attachment on the ground of non-residence if one of the partners resides in the state. Blair v. Russell (1919), — Miss. —, 81 So. 785.

Not liable under Georgia Code: Hendricks v. Middlebrooks (1903), 118 Ga. 131, 44 S. E. 835 (slander).

be incurred by a previous authorization or a subsequent ratification.

§ 302. Liability of firm for partner's malicious or criminal act.—But the partners would not be liable, unless previously authorized or subsequently ratified, for similar acts committed by the partner outside the course of the partnership business and for his own purposes or from his own private malice or ill-will.[39]

Neither can one partner, not personally in fault, ordinarily be held liable in a criminal or penal action for the acts of his partner.[40]

§ 303. Uniform Partnership Act.—"Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a

[39] See Rosenkrans v. Barker (1885), 115 Ill. 331, 56 Am. Rep. 169, Mechem's Cas. 405 (lays down a doubtful rule): Bernheimer v. Becker (1905), 102 Md. 250, 62 Atl. 526, 111 Am. St. R. 356, 3 L. R. A. (N. S.) 221; Marks v. Hastings (1892), 101 Ala. 165, 13 So. 297 (all cases of false imprisonment or wrongful arrest). Compare McIlroy v. Adams (1877), 32 Ark. 315; Haney Mfg. Co. v. Perkins (1889), 78 Mich. 1, 43 N. W. 1073; Staples v. Schmid (1893), 18 R. I. 224, 26 Atl. 193, 19 L. R. A. 824; Robinson v. Goings (1886), 63 Miss. 500; Peckham Iron Co. v. Harper (1884), 41 Ohio St. 100.

In Gwynn v. Duffield (1885), 66 Iowa 708, 24 N. W. 523, 55 Am. Rep. 286, firm held not liable for negligence of one partner in a drug firm in *giving away* medicine, that act not being in course of business. In Davis v. Dodson (1905), 95 Ga. 718, 22 S. E. 645, 51 Am. St. R. 108, 29 L. R. A. 496, Mechem's Cas. 942, firm held not liable for misconduct of partner who had agreed, for inducement moving to himself only, to collect a debt without charge. Firm not liable for slander unless words spoken in course of business: Duquesne Distributing Co. v. Greenbaum (1909), 135 Ky. 182, 121 S. W. 1026, 21 Ann. Cas. 481, 24 L. R. A. (N. S.) 955.

[40] See Watson v. Hinchman (1879), 42 Mich. 27, 3 N. W. 236; McNeely v. Haynes (1877), 76 N. C. 122 (arrest for fraud under fraudulent debtors' act). Partner not liable to statutory penalty for "willfully and knowingly" cutting timber, where he was entirely innocent, and the cutting had been done by his copartner, Williams v. Hendricks (1897), 115 Ala. 277, 22 So. 439, 67 Am. St. R. 32, 41 L. R. A. 650, Mechem's Cas. 948.

partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act."[41]

§ 304. Liability of firm for partner's breach of trust.—Breaches of trust or misappropriation by one partner in respect of funds or property which come into the possession of the partnership in the course of its business will make the partners responsible;[42] but they will not be responsible, as for breach of trust, because one partner wrongfully employs in the partnership business funds of which he alone was trustee, if his partners were ignorant of the source of the money or of his want of title to it,[43] though they would be so liable if they had such knowledge.[44]

The question of following and recovering the fund as a trust fund, if still extant and traceable, involves different considerations;[45] as does the question whether the other partner who had in good faith put in his capital against the first partner's contribution out of the trust fund, would be considered a purchaser for value.[46]

§ 305. The Uniform Partnership Act provides that "The partnership is bound to make good the loss:

41 Sec. 13.

42 See Todd v. Jackson (1881), 75 Ind. 272; Monmouth College v. Dockery (1911), 241 Mo. 522, 145 S. W. 785; Harman v. Johnson (1853), 2 El. & Bl. 61, Gilm. Cas. 399.

43 See Englar v. Offutt (1889), 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332, Mechem's Cas. 398; Gilruth v. Decell (1894), 72 Miss. 232, 16 So. 250, Burd. Cas. 351, Gilm. Cas. 401; Shaffer v. Martin (1898), 25 N. Y. App. Div. 501, 49 N. Y. S. 853; Jaques v. Marquand (1826), 6 Cow. (N. Y.) 497; Payne v. Dexter (1912), 211 Mass. 1, 97 N. E. 77. Neither are they liable as *debtors:* Englar v. Offutt, *supra.* The knowledge of the guilty partner is not imputed to his partners: Gilruth v. Decell, *supra;* Bienenstok v. Ammidown (1898), 155 N. Y. 47, 49 N. E. 321; Palmer v. Scott (1880), 68 Ala. 380 holds firm responsible without knowledge.

44 See Guillou v. Peterson (1879), 89 Pa. 163; Penn v. Folger (1899), 182 Ill. 76, 55 N. E. 192; Carter v. Lipsey (1883), 70 Ga. 417; Hutchinson v. Smith (1837), 7 Paige (N. Y.) 26.

45 See Englar v. Offutt, *supra.*

46 See Hollenback v. More (1878), 44 N. Y. Super. 107.

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership."[47]

[47] Sec. 14.

CHAPTER XII.

OF THE LIABILITY OF THE FIRM FOR THE ACTS OF ITS AGENTS AND SERVANTS.

§ 306. Firm liable like other principals for the acts of its servants and agents.—It seems desirable to call attention—not for the purpose of discussion but that it may not be overlooked—to the liability of the firm for the acts of its ordinary servants and agents. The discussion of the preceding chapter was devoted to the acts of the partner as agent of the firm, but the firm may, as has been seen, employ all the agents and servants, who are not partners, that the business may demand. For the acts of these agents and servants, whether in contract or in tort, the firm is liable in the same cases and upon the same conditions as any other principal or master.

The discussion of this liability belongs, therefore, to treatises upon the law of agency and master and servant; with the former of which, at least, it is assumed that the student is already familiar.

CHAPTER XIII.

OF THE NATURE AND EXTENT OF THE LIABILITY OF PARTNERS.

§ 307. In general.—The question of the liability of partners involves both the nature of that liability and its extent. These subjects, therefore, will be separately considered.

I. OF THE NATURE OF PARTNERSHIP OBLIGATIONS.

§ 308. Partnership obligations when arising on contract are joint.—The obligation of those contracts which are binding upon the partnership is, at common law, the joint obligation of all the partners and not the several obligation of any of them.[1]

[1] See Haralson v. Campbell (1879), 63 Ala. 278, Mechem's Cas. 430.

Taking judgment against each partner separately, for substantially the same amount, instead of taking a joint judgment against all of them, is only an irregularity. Judd

One partner may, as has been seen, bind himself only; but if he binds the partnership, he binds all members of it jointly and not severally.

It is sometimes said that, while partnership contracts are thus joint at law, they are joint and several in equity; but this seems to be true as respects the remedy only.[2]

This doctrine that the contractual obligations of partners are joint has several important consequences. It affects the question of parties to actions;[3] it results in the rule that a judgment against part, or a release to part, ordinarily releases the others;[4] and it materially affects the remedies of the creditor after the death of one of the partners.[5]

In some States, statutes have expressly changed the rule in partnership cases.[6] In several States, statutes have, in general terms, attempted to make all joint obligations joint and several. In some of the States, these general statutes have been interpreted as applying to partnership cases as well as others;[7] in other States, they have been held not to apply to partnership debts.[8]

The Uniform Partnership Act enacts substantially the common law rule.[9]

Oil Co. v. Hubbell (1879), 76 N. Y. 543, Mechem's Cas. 431, Gilm. Cas. 311.

2 See *post*, § 411. And see the opinions in Kendall v. Hamilton (1879), 4 App. Cas. 504, Gilm. Cas. 293. See Article by Professor Burdick, 11 Columbia Law Review 101.

3 See *post*, § 324.

4 See *post*, §§ 309-311.

5 See *post*, § 411.

6 *E. g.*, in Alabama, Arkansas, District of Columbia, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, West Virginia. In some of these it is "for purposes of suit."

7 See Hamilton v. Buxton (1845), 6 Ark. 24; Ryerson v. Hendrie (1867), 22 Iowa 480; Gates v. Watson (1874), 54 Mo. 585; Williams v. Rogers (1879), 77 Ky. (14 Bush) 776.

8 See Sherburne v. Hyde (1900), 185 Ill. 580, 57 N. E. 776; Thompson v. White (1898), 25 Colo. 226, 54 Pac. 718.

9 Thus sec. 15, declares: "All partners are liable (a) jointly and severally for everything chargeable to the partnership under sections 13 and 14 [wrongful acts and breaches of trust]. (b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

§ 309. Same subject—Judgment against one partner releases others.—The obligation of firm contracts being joint, if the creditor proceeds to judgment against one or part of them alone, where no statute has changed the rule, he releases the others.[10] In a leading case [11] in the Supreme Court of the United States, where a creditor who had taken judgment against one partner upon a firm note in one state sought to recover against another partner in another state, the court, through Mr. Justice Field, said: "It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements—that of each contractor individually, and that of all jointly,—and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except where there is some ground of personal release from liability, as infancy, or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought,

10 See Kendall v. Hamilton (1879), L. R. 4 App. Cas. 504, Gilm. Cas. 293; McMaster v. City Nat. Bank (1909), 23 Okla. 550, 101 Pac. 1103, 138 Am. St. R. 831; Ryckman v. Manerud (1913), 68 Oreg. 350, 136 Pac. 826, Ann. Cas. 1915 C 522; Anderson v. Stayton Bank (1916), 82 Oreg. 357, 159 Pac. 1033; Blythe v. Cordingly (1905), 20 Colo. App. 508, 80 Pac. 495; Thompson v. Emmert (1854), 15 Ill. 415.

11 Mason v. Eldred (1867), 73 U. S. (6 Wall.) 231, 18 L. ed. 783, Mechem's Cas. 433, Burd. Cas. 388, Gilm. Cas. 281.

were made jointly with another and not with the defendant alone—a plea which would be without meaning if the copartnership contract was the several contract of each copartner."

§ 310. Same subject.—"The general doctrine maintained in England and the United States," continued the same learned judge, "may be briefly stated. A judgment against one, upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action and the fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause."

This rule, however, may be changed by a statute altering the effect of the judgment as to the defendants who were not personally served with process,[12] and has been so changed in several States.

§ 311. Same subject—Release of one releases all.—Another consequence of the joint character of partnership obligations is the rule that a release of one of the partners releases all.[13]

[12] Mason v. Eldred, *supra*. See, also, Brooks v. McIntyre (1856), 4 Mich. 316; Sugg v. Thornton (1889), 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447; Harker v. Brink (1854), 24 N. J. L. 333; Patten v. Cunningham (1885), 63 Tex. 666; Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Wood v. Watkinson (1846), 17 Conn. 500, 44 Am. Dec. 562, and note; Nathanson v. Spitz (1895), 19 R. I. 70, 31 Atl. 690, Burd. Cas. 393.

[13] Lindley on Partnership (7th ed.), 267; Harbeck v. Pupin (1895), 145 N. Y. 70, 39 N. E. 722; Merritt v. Bucknam (1897), 90 Me. 146, 37 Atl. 885; Clark v. Mallory (1900), 185 Ill. 227, 56 N. E. 1099; note, 138 Am. St. R. 834. Thus a receipt under seal, given to one of two or more joint debtors, "in full satisfaction for his liability" upon the obligation, imports a technical release, and therefore releases all. Hale v. Spaulding (1888), 145 Mass.

This rule applies, however, only to the case of a technical release under seal, and does not extend to a mere covenant not to sue one partner, or to any other instrument reserving the creditor's rights against the other partners, which, though in the form of a release, may be treated as a covenant not to sue rather than as an absolute release.[14]

In the case of the release, however, there is one material distinction as compared with the taking of a judgment. If the obligation be joint, the release of one releases all and it is immaterial that the obligation was also several. In other words, the rule applies whether the obligation be simply joint or joint and several.[15]

Statutes in a number of States now permit a creditor to settle with one of several joint debtors without losing his claim against the others for their proportion.[16]

§ 312. Partnership obligations arising from tort are joint and several.—The liability, however, of partners for torts committed by one partner or by the servant of the firm is joint and several, and the action may be brought against one or all

482, 14 N. E. 534, 1 Am. St. R. 475, Mechem's Cas. 440.

Not so, where one released was an infant who claimed exemption on that ground. Kirby v. Cannon (1857), 9 Ind. 371; Young v. Currier (1885), 63 N. H. 419.

14 Lindley, *ubi supra;* Hale v. Spaulding, *supra;* Benjamin v. McConnell (1847), 4 Gilm. (9 Ill.) 536, 46 Am. Dec. 474; Berry v. Gillis (1845), 17 N. H. 9, 43 Am. Dec. 584; Goodnow v. Smith (1836), 18 Pick. (Mass.) 414, 29 Am. Dec. 600, Mechem's Cas. 441; Haney v. Creamery Co. (1899), 108 Iowa 313, 79 N. W. 79.

While a covenant not to sue, in the case of a single debtor, is frequently, to avoid circuity of action, treated as a release, it is not so in the case of a covenant not to sue one of several debtors. Here the creditor *may* sue all (even though he thereby breaks his covenant not to sue one of them and must pay him damages therefor, which usually are nominal), and the covenant not to sue that one can not be treated as a release.

15 See Tuckerman v. Newhall (1822), 17 Mass. 581; Benjamin v. McConnell, *supra;* Goodnow v. Smith, *supra;* Heckman v. Manning (1879), 4 Colo. 543; Crawford v. Roberts (1880), 8 Oreg. 324.

16 See Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Northern Ins. Co. v. Potter (1883), 63 Cal. 157, Gilm. Cas. 286.

or an intermediate number.[17] The Uniform Partnership Act is to the same effect.[18]

"To this general rule," says Mr. Justice Lindley,[19] "an exception occurs where an action *ex delicto* is brought against several persons in respect of their ownership in land, for then they are liable jointly, and not jointly and severally." But this exception has, as to partners, been modified by the English Partnership Act. A release of one of several joint wrong doers ordinarily releases all.[20]

II. Of the Extent of Partnership Liability.

§ 313. Each partner liable in solido for partnership obligations.—Although the obligation of partnership liabilities may be in nature joint, it does not follow that the liability when once judicially established must, by the creditor, be jointly or ratably enforced against the partners. The liability may be *joint*, but it is also *entire*. Each partner, therefore, is personally and individually liable for the entire amount of all such obligations, whether arising from contract or tort, as are binding upon the firm. His liability, in ordinary partnerships, is not limited by the amount of his contribution to the partnership capital, but extends to his entire property; and it makes no difference what may be his share or interest in the partnership business, or whether he is an active or a secret partner, or whether the other partners are pecuniarily responsible or not; he is liable *in solido* for the partnership obligations.[21]

17 See White v. Smith (1860), 12 Rich. (S. C.) L. 595, Gilm. Cas. 306; Howe v. Shaw (1868), 56 Me. 291; Roberts v. Johnson (1874), 58 N. Y. 613.

18 Sec. 15 quoted *ante*, § 308.

19 Lindley on Partnership (7th ed.), 320, citing 1 Wms. Saunds. 291, *f* and *g*.

20 See Abb v. Northern Pac. Ry. Co. (1902), 28 Wash. 428, 68 Pac. 954, 92 Am. St. R. 864, and note, 58 L. R. A. 293; Louisville, etc., Co. v. Barnes (1904), 117 Ky. 860, 79 S. W. 261, 111 Am. St. R. 273, and note, 25 Ky. Law. R. 2036, 64 L. R. A. 574.

21 See Hallowell v. Blackstone Nat. Bank (1891), 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315, Burd. Cas. 288, Gilm. Cas. 309, where under "claims against him," it was held that firm acceptances were to be included.

In tort, see Loomis v. Barker (1873), 69 Ill. 360, Gilm. Cas. 308.

§ 314. Individual property of partner may be taken to satisfy partnership debt.—Moreover, if judgment be obtained against the partners upon an obligation existing against the partnership, the execution, though in form against all, may, unless otherwise provided by statute, be levied directly upon the individual property of any one or more of the partners without regarding or exhausting the firm property. The creditor, further, is under no obligation to levy against all the partners ratably, but may select any one or more and levy execution against him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves.[22] In case any partner is not served with process, no personal judgment can ordinarily be rendered against him, nor can his individual property usually be taken, though the firm property may be seized.[23] Where, as in some States, an action may be brought against the firm as an entity, and is so brought, a similar result would usually follow.[24]

If conflict arises between the firm creditors and the individual creditors of the partner, as to the application of the individual property of a partner, special rules apply which will be hereafter considered when the general subject of the application of assets to the claims of creditors is discussed.[25]

[22] See Stevens v. Perry (1873), 113 Mass. 380, Mechem Cas. 961, Ames' Cas. 330, Burd. Cas. 377; Randolph v. Daly (1863), 16 N. J. Eq. 313; Clayton v. May (1881), 68 Ga. 27; Stout v. Baker (1884), 32 Kan. 113, 4 Pac. 141; Haralson v. Campbell (1879), 63 Ala. 278, Mechem's Cas. 430. But in Jaffray v. Jennings (1894), 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645, Mechem's Cas. 416, Burd. Cas. 378, Gilm. Cas. 503, it is held that the individual property of an innocent partner is not liable to attachment for a firm debt fraudulently contracted by another member of the firm. See also, Curtis v. Hollingshead (1834), 14 N. J. L. 402, Burd. Cas. 285.

[23] See Sugg v. Thornton (1889), 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447; Hall v. Lanning (1875), 91 U. S. 160, 23 L. ed. 271; Brooks v. McIntyre (1856), 4 Mich. 316; Yerkes v. McFadden (1894), 141 N. Y. 136, 36 N. E. 7, 344, Burd. Cas. 382.

See, also, People's Nat. Bank v. Hall (1904), 76 Vt. 280, 56 Atl. 1012.

[24] So held, for example, in Iowa. See Lansing v. Bever Land Co. (1913), 158 Iowa 693, 138 N. W. 833 citing other Iowa case.

[25] See *post*, Ch. XX.

§ 315. Partner paying debt may have contribution.—Where one partner is thus compelled to pay or satisfy the whole of a partnership debt, he has a remedy, usually upon an accounting in equity,[26] to require the other partners to contribute their *pro rata* shares. For though each partner as to third persons is liable for all the partnership debts, yet as between themselves each partner is liable only for his own share. And even as to third persons, though each is liable for all the debts of the firm, yet his liability is sometimes said to be as a principal debtor for his own share, and as a surety for the other partners for the remainder.

§ 316. Exemptions from execution on partnership property.—The present seems an appropriate place to mention the question of the right of the firm or of one partner to claim the ordinary statutory exemptions of certain amounts from execution, provided for debtors generally, when an execution is levied upon the partnership property. The authorities are very much in conflict, but the clear weight of authority is to the effect that, during the continuance of the partnership, neither the firm nor the partner can claim such exemptions.[27] That is to say, the firm as an entity can not claim it, and the individual partners

26 See *ante*, § 190.

27 See Jensen v. Wiersma (1919), — Iowa —, 170 N. W. 780, 4 A. L. R. 298, with elaborate note; Cowan v. Creditors (1888), 77 Cal. 403, 19 Pac. 755, 11 Am. St. Rep. 294, and cases cited; Thurlow v. Warren (1889), 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472; Aiken v. Steiner (1892), 98 Ala. 355, 13 So. 510, 39 Am. St. Rep. 58; Pond v. Kimball (1869), 101 Mass. 105, Burd. Cas. 186; Prosser v. Hartley (1886), 35 Minn. 340, 29 N. W. 156; Goudy v. Werbe (1888), 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Peaslee v. Sanborn (1895), 68 N. H. 262, 44 Atl. 384; *In re* Spitz (1896), 8 N. Mex. 622, 45 Pac. 1122, 34 L. R. A. 604; Green v. Taylor (1895), 98 Ky. 330, 17 Ky. Law R. 897, 32 S. W. 945, 56 Am. St. R. 375, Burd Cas. 113; Aultman v. Wilson (1896), 55 Ohio St. 138, 44 N. E. 1092, 60 Am. St. R. 677, Burd. Cas. 448; Hart v. Hiatt (1899), 2 Indian Ter. 245, 48 S. W. 1038, Gilm. Cas. 567; Porch v. Arkansas Milling Co. (1898), 65 Ark. 40, 45 S. W. 51, 67 Am. St. R. 895; Richardson v. Redd (1896), 118 N. Car. 677, 24 S. E. 420; Miller v. Waite (1899), 59 Neb. 319, 80 N. W. 907, affd. 60 Neb. 431, 83 N. W. 355; First Nat. Bank v. Frost (1884), 61 Wis. 335, 21 N. W. 280.

collectively or singly can not claim it in the partnership property. Since every partner has a right to have all of the partnership property applied first to the payment of the partnership debts, no single partner, without his copartners' consent at least, could claim any personal exemption in the partnership property which would interfere with such application.[28] After the partnership's affairs are wound up and each partner's residuary interest is segregated, there could be no objection to his claiming individual exemptions in that as against his individual creditors.[29] In Michigan, Georgia, North Carolina and New York and perhaps some other States somewhat different rules have been laid down.[30]

The Uniform Partnership Act is non-committal upon the subject of the partner's individual exemption,[31] but it expressly declares that "when partnership property is attached for a partnership debt the partners or any of them or the representatives of a deceased partner cannot claim any right under the homestead or exemption laws."[32]

[28] See Richardson v. Redd, *supra.* May with consent of all, O'Gorman v. Fink (1884), 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58; Lee v. Bradley (1902), 44 Fla. 787, 33 So. 456. *Sed quaere,* see Wills v. Downs (1890), 38 Ill. App. 269.

[29] See Aiken v. Steiner, *supra.* Farmer's Union Co. v. Seitz (1910), 93 Ark. 329, 124 S. W. 780; Southern Coal Co. v. Smith (1899), 105 Ky. 769, 49 S. W. 807, 20 Ky. Law R. 1594; Moyer v. Drummond (1889), 32 S. Car. 165, 10 S. E. 952, 17 Am. St. R. 850, 7 L. R. A. 747; Goudy v. Werbe, *supra;* Dennis v. Kass, (1895), 11 Wash. 353, 39 Pac. 656, 48 Am. St. R. 880.

[30] See McCoy v. Brennan (1886), 61 Mich. 362, 28 N. W. 129, 1 Am. St. Rep. 589 (each partner may claim it as against a firm creditor); Blanchard v. Pascal (1881), 68 Ga. 32, 45 Am. Rep. 474 (same effect); Evans v. Bryan (1886), 95 N. C. 174, 59 Am. Rep. 233 (allowed to partner individually when pursued by his partner as an individual creditor); Stewart v. Brown (1867), 37 N. Y. 350, 93 Am. Dec. 578 (partners may claim it where it would have been allowed to an individual debtor); St. Louis, etc., Co. v. International, etc., Co. (1889), 74 Tex. 651, 12 S. W. 842, 15 Am. St. R. 870.

[31] Sec. 28, (3) provides, "Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership." From its location, this provision seems to have in mind granting him his exemption when his separate interest is pursued by his individual creditor.

[32] Sec. 25 (c).

III. Of the Beginning and Ending of Liability.

§ 317. In general.—The liability of the partner is based upon the theory that he was a principal in the business in which the obligation was incurred. It often becomes material, therefore, to determine when he became or ceased to be a partner, and whether he was such at the time the disputed liability arose. He may contend that the obligation was incurred before he became a partner; or that it arose after he had ceased to be such. Where the question is whether any partnership at all had then been organized, the question will be governed by principles already referred to. If the question is whether all partnership relations have ceased, considerations hereafter to be mentioned will control. But a person may be admitted as a partner to a firm already existing, or he may retire from a firm which thereafter continues business, and his liability in either case requires some special consideration.

§ 318. Of an incoming partner—Under the common law.—A person who enters a previously existing firm is often called an incoming partner. The admission of a new partner really constitutes in law a dissolution of the old and the creation of a new partnership,[33] though in actual practice it is often not so regarded, the firm by consent being treated as continuing, notwithstanding the change in membership.

An incoming partner is not, by the common law, liable for the previously contracted obligations of the firm to which he is thus admitted, unless by special agreement he has assumed such a liability, or has so conducted himself as to raise a presumption of such an agreement.[34] He acquires also no greater in-

[33] See Hatchett v. Blanton (1882), 72 Ala. 423; Freeman v. Huttig Co. (1913), 105 Tex. 560, 153 S. W. 122, Ann. Cas. 1916 E, 446.

Can only be introduced with the consent of all; one partner alone cannot take in a new partner; Love v. Payne (1880), 73 Ind. 80, 38 Am. Rep. 111.

[34] See Ringo v. Wing (1887), 49 Ark. 457, 5 S. W. 787; Frazer v. Howe (1883), 106 Ill. 563 (where widow took deceased husband's place in firm); Lucas v. Coulter (1885), 104 Ind. 81, 3 N. E. 622.

Where new partner is added to an existing firm, it is really the creation of a new partnership and the new partner requires no interest in the assets of the former partner-

terest in the property of the former partnership than the agreement which provides for his admission may confer upon him. The same agreement will also, ordinarily, prescribe the proportion of the existing obligations which he is to assume.[35] This proportion will usually be the same as that of the interest acquired, but it is not necessarily the same. His rights of action on existing obligations due to the firm into which he enters would usually be those of a mere assignee.[36]

§ 319 —— No rule of partnership or of agency, of course, can alone make an incoming partner liable for the obligations incurred before he became actually or ostensibly a member of the firm. He must in some form *assume* the liability, if he is to be liable at all.[37] His agreement to make himself responsible must have a consideration,[38] and it must be one available to the

ship and assumes no liability for its debts unless there is an agreement to that effect: Hatchett v. Blanton, *supra*. Not liable unless he agreed to be; Babcock v. Stewart (1868), 58 Pa. 179. No presumption of such an agreement; it must be shown: Kountz v. Holthouse (1877), 85 Pa. 235; Bracken v. Dillon (1879), 64 Ga. 243, 37 Am. Rep. 70; Peyser v. Myers (1892), 135 N. Y. 599, 32 N. E. 699; Peters v. McWilliams (1884), 78 Va. 567; Wolff v. Madden (1893), 6 Wash. 514, 33 Pac. 975, Gilm. Cas. 325; that a particular debt was among those assumed may appear from conduct and circumstances: Flour City Bank v. Widener (1900), 163 N. Y. 276, 57 N. E. 471; Peyser v. Myers, *supra*. If certain enumerated debts are assumed, he is not liable for others; McGilvery v. McGilvery (1912), 23 Idaho 116, 128 Pac. 978.

35 See Serviss v. McDonnell (1887), 107 N. Y. 260, 14 N. E. 314.

36 See *post* § 325.

37 Courts sometimes infer an assumption from rather slight evidence. See Wood v. Macafee (1918), 172 N. Y. Supp. 703, citing many cases. Especially where the new firm takes the old firm's property; Shaw v. McGregory (1870), 105 Mass. 96. In Cross v. National Bank (1876), 17 Kan. 336, Gilm. Cas. 326, the court says: "While an incoming partner does not by the mere fact of joining the firm become liable for its prior debts, yet he may assume such liability, and it is a question in fact whether he did so. And very slight testimony, the books say, will be sufficient to show he did," citing *Ex parte* Jackson (1790), 1 Ves. 131; Updike v. Doyle (1863), 7 R. I. 446, and other cases.

38 Must be consideration; Bracken v. Dillon, *supra;* Rohlfing v. Carper (1894), 53 Kan. 251, 36 Pac. 336.

The interest acquired in the property may be a sufficient consideration; Rohlfing v. Carper, *supra*.

New partner bound by note given by new firm in consummation of

party who seeks to enforce it. It may be an agreement with the other partners only and which they only can enforce,[39] or it may be an agreement which, if not actually made with the creditors, or to which they become parties by an express or an implied novation,[40] is yet one so far made for the benefit of the creditors that they may enforce it in those jurisdictions which permit the beneficiary to sue at law.[41] The consideration *may* move from the creditors: in the ordinary case, however, it does not, and the creditors are merely the beneficiaries of the agreement between the old partners and the new one. As will be seen, the fact that a new firm or a new partner assumes the debts of the old one does not of itself release the liability of the old one to the creditor unless he consents to the change.

Where, at the same time that a new partner comes in a previous one also retires, there are additional questions, some of which

dealings with old, though creditor did not know of the new partner: Kearney v. Snodgrass (1885), 12 Ore. 311, 7 Pac. 309.

As to whether such undertaking is a promise to pay the debt of another within the Statute of Frauds, see Bracken v. Dillon, *supra;* Spann v. Cochran (1885), 63 Tex. 240; Townsend v. Long (1874), 77 Pa. 143, 18 Am. Rep. 438.

39 In New York, notwithstanding Lawrence v. Fox, it is held that an incoming partner who agrees that the new firm shall pay the debts of the old, is liable to the old firm only and not the creditors of that firm: Wheat v. Rice (1884), 97 N. Y. 296; Serviss v. McDonnell (1887), 107 N. Y. 260, 14 N. E. 314; see also Ayers v. Gallup (1880), 44 Mich. 13, 5 N. W. 1072; Hicks v. Wyatt (1861), 23 Ark. 56, Gilm. Cas. 328.

40 If the creditor is informed and expressly or by implication consents there may be found to be a novation, *post,* § 429.

41 That the creditor may sue on the agreement to assume and pay, see Maxfield v. Schwartz (1890), 43 Minn. 221, 45 N. W. 429; Dodge v. Cutrer (1911), 100 Miss. 647, 56 So. 455; Poole v. Hintrager (1882), 60 Iowa 180, 14 N. W. 223; Hannigan v. Allen (1891), 127 N. Y. 639, 27 N. E. 402; Arnold v. Nichols (1876), 64 N. Y. 117, Gilm. Cas. 328; Ellis v. Harrison (1891), 104 Mo. 270, 16 S. W. 198; Shamp v. Meyer (1886), 20 Neb. 223, 29 N. W. 379; Merriman v. Mfg. Co. (1878), 12 R. I. 175; Blake v. Atlantic Bank (1913), 33 R. I. 464, 82 Atl. 225, 39 L. R. A. (N. S.) 874; Spana v. Cochran (1885), 63 Tex. 240; Townsend v. Long (1874), 77 Pa. 143, 18 Am. Rep. 438; White v. Thielens (1884), 106 Pa. 173; Adams v. Kuehn (1888), 119 Pa. 76, 13 Atl. 184. *Contra:* Morgan v. Randolph (1900), 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653; Ayres v. Gallup (1880), 44 Mich. 13, 5 N. W. 1072.

are touched in the following sections dealing with an outgoing partner.

§ 320. —— Under the Uniform Partnership Act.—The Uniform Partnership Act proposes a radical change in the existing law. It provides that "A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."[42] It will be observed that this does not, like the contractual assumption, impose upon the incoming partner a general and individual liability which could be satisfied out of his separate estate. It presumptively does not preclude a contractual assumption with its ordinary consequences. The purpose of the provision is to enable the creditors of the first firm more effectually to secure payment out of its assets notwithstanding their transfer to the succeeding firm.[43]

§ 321. Of an outgoing partner.—A person who retires from a firm which thereafter continues is said to be an outgoing or retiring partner. His withdrawal is, of course, in law ordinarily a dissolution of the firm,—though in practice the firm is frequently spoken of as continuing,—and his liability for future acts is governed by the general rules governing dissolution. He is, as will be seen,[44] in general liable for acts done until he has not only withdrawn from the firm but has also given due notice of his withdrawal.[45]

His liability to creditors for the existing debts and obligations of the partnership is, of course, not terminated by his withdrawal, but continues with all of the ordinary incidents, such as liability to action, joinder as a party, and the like, until he has in some way been discharged. No arrangement made between the continuing partners and himself can, of itself, re-

[42] Sec. 17. The same provision is repeated, in slightly different language, in section 41 of the act.

[43] See *post*, § 462.

[44] See *post*, § 398.

[45] See *post*, §§ 387-397.

lease him from his liability to the existing creditors unless the latter in some way assent to it, although, as will be seen, such arrangements are sometimes held to create a relation of principal and surety between the continuing and the retiring partners, which, when brought to the attention of the creditor, he may not ignore.[46] The creditor may also, as will be seen, expressly or tacitly so assent to the arrangement as to work a novation and the consequent release of the outgoing partner.[47]

§ 322. —— The outgoing partner whom the continuing partners have undertaken to protect has his remedy against them according to the nature of their undertaking.[48] If their agreement was to pay the debts when due, there will be a breach of that agreement if they fail to do so, even though the outgoing partner has not paid or been compelled to pay the debts himself. That fact affects only the measure of damages, not the

46 See *post*, § 428.

47 See *post*, § 429.

48 See Meyer v. Parsons (1900), 129 Cal. 653, 62 Pac. 216; Alexander v. McPeck (1904), 189 Mass. 34, 75 N. E. 88; Robinson v. Roos (1891), 138 Ill. 550, 28 N. E. 821; Griffin v. Orman (1860), 9. Fla. 22; Berridge v. Slawson (1893), 94 Mich. 484, 54 N. W. 278; Bunton v. Dunn (1866), 54 Me. 152; Edwards v. Remington (1881), 51 Wis. 336, 8 N. W. 193, Mechem's Cas. 907.

Where one partner sells out to a third person, who agrees to assume his share of the debts, and the purchaser and the other partner form a new partnership and continue the business, there is *held* to be an implied undertaking on the part of the continuing partner to save the retiring partner harmless to the extent of the assets only and not absolutely: Peyton v. Lewis (1851), 51 Ky. (12 B. Mon.) 356, Mechem's Cas. 1028. Compare La Montagne v. Bank of N. Y. (1905), 183 N. Y. 173, 76 N. E. 33; Sheppard v. Bridges (1911), 137 Ga. 615, 74 S. E. 245.

Retired partners *held* not liable to contribute to the members of the continuing partnership who have paid the existing debts; Savage v. Putnam (1865), 32 N. Y. 501.

In a joint stock company or partnership with transferable shares, members who retire leaving the assets and business to the others and their successors are *held* entitled to be indemnified by the latter against the existing debts: Tyrell v. Washburn (1863), 88 Mass. (6 Allen) 466.

Where partner sells out to his copartners who continue the business, *held* implied agreement on their part to indemnify him against existing debts: Cobb v. Benedict (1906), 27 Colo. 342, 62 Pac. 222, Mechem's Cas. 557.

breach. If the agreement were to indemnify him against loss, he ordinarily could not complain until he had paid or been compelled to pay the debts or any of them. He would have an action at law for damages, or, in many cases, in equity to compel performance of the agreement to indemnify.

CHAPTER XIV.

OF ACTIONS BY AND AGAINST THE PARTNERSHIP.

§ 323. In general.—The general subject of actions by and against the partnership obviously suggests a great variety of questions, such as process, parties, pleading, evidence, defences, and the like, many of which are too extensive or technical for consideration in such a book as this. The question, however, of

who are the proper parties to such actions is one of rather fundamental interest, and so are some matters of defense like set-off, and to these subjects this chapter will be chiefly confined. The question of who should be the parties to actions by the partnership involves somewhat different considerations from those raised when the action is against the partnership. Each subject will therefore be separately considered. What is here said has reference to actions brought during the continuance of the partnership. The rules applicable where the partnership is dissolved by death or otherwise will be considered later when dealing with the effect of dissolution.[1]

I. Parties to Actions by the Partnership.

§ 324. Who should sue in actions by the firm.—The question who should join as parties plaintiff may arise when the action is (1) in contract, or (2) in tort. In the former case the contract may have been made (*a*) in the name of the firm, or (*b*) in the name of one partner for the benefit of the firm.

1. *In Contract.*

§ 325. *a.* Contracts made in firm name.—In actions upon contracts made in the name of the firm, the action should be brought in the individual names of all the persons who were the actual and ostensible partners at the time the debt or contract sued upon was made or incurred. If some of those partners have since retired from the firm, the action must still be in the names of those who were the partners at the time, and cannot be maintained in the names of the present partners, except in those cases in which the outgoing partners have assigned their interests to the remaining partners, and the statutes permit such assignees to sue in their own names, or in which there has been a promise to pay to the new firm.

If one has been admitted as a partner who was not such at the time the contract was made, he cannot join in the action, although it were agreed as between the partners themselves that he should become equally interested with the others in all the

[1] See *post*, § 402 *et seq.*

existing property and rights of the firm,—unless he may sue as an assignee, or unless, after the accession of the incoming partner, there has been a new and binding promise to pay the firm as newly constituted.[2] Dormant partners are admissible but not indispensable parties.[3] Nominal partners need not be joined unless they have been expressly named in the contract,[4] but it is not improper to join them.[5] These rules seem not to be changed by the codes of procedure.

§ 326. Same subject.—The mere fact that the partnership has since been dissolved does not ordinarily change the rule requiring joinder.[6] If the partnership was dissolved by the death of a partner, then, as will be seen, the surviving partner or partners will sue "as survivors of" themselves and the deceased partner.[7] If dissolved by the assignment of one partner's in-

[2] See Fireman's Ins. Co. v. Floss (1887), 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

[3] See Wood v. O'Kelly (1851), 8 Cush. (Mass.) 406; Hilliker v. Loop (1833), 5 Vt. 116, 26 Am. Dec. 286; Waite v. Dodge (1861), 34 Vt. 181; Monroe v. Ezzel (1847), 11 Ala. 603; Seymour v. Railroad Co. (1882), 106 U. S. 320.

Where K alone carries on business in name of K. & Son, he may sue alone to recover for services rendered: Kell v. Nainby (1829), 10 B. & C. 20, 5 M. & R. 76; Lasher v. Colton (1907), 225 Ill. 234, 80 N. E. 122, 8 A. & E. Ann. Cas. 367; Bishop v. Hall (1857), 75 Mass. (9 Gray) 430.

If the dormant partner joins, defendant will not thereby be deprived of defenses which he had acquired against the ostensible partners only before he knew of the others: Hilliken v. Loop, *supra*.

[4] See Guidon v. Robson (1809), 2 Camp. 302; Enix v. Hays (1878), 48 Iowa 86. (Here J, who was really the sole owner, sues alone to recover the price of cattle sold by him to defendant: defendant cannot insist upon the joinder of P, alleged by him to be a nominal partner with J; nor can he set off against J, a claim really against P only, even though when he acquired it he erroneously thought it was against J and P.)

[5] See Jones v. Howard (1876), 53 Miss. 707; Waite v. Dodge (1861), 34 Vt. 181. Where three persons were doing business as partners but two of them were nominal only, in an action by the three on a note, payable to them in their firm name, defendant not permitted to set off a claim which he holds against the third (and real owner) only: Jones v. Howard, *supra*.

[6] See Fish v. Gates (1882), 133 Mass. 441; Hyde v. Moxie Co. (1894), 160 Mass. 559, 36 N. E. 585.

[7] See *post*, §§ 402, 403.

terest, the action will be in the names of the remaining partner and the assignor for the benefit of the assignee, except in jurisdictions where an assignee may sue in his own name;[8] if dissolved by bankruptcy of one partner, the solvent partner and the assignee would sue under former Acts,[9] though under the entity theory of the present Act the rule may be different as to the assignee.[10] On partnership claims assigned by an outgoing partner to the others the latter could not, at common law, sue in their own names alone (except where the claim was a negotiable instrument) but must sue in the name of all for the benefit of the assignees.[11] Under some statutes and the codes of procedure, the assignee may sue in his own name.[12]

123/185.
21//791.
18//276.

In actions upon contract, at common law, a mis-joinder or non-joinder of necessary parties as plaintiffs, where the defect appeared upon the face of the pleadings, could be taken advantage of by demurrer, motion in arrest of judgment, or writ of error; if not so apparent, by plea in abatement or motion for a nonsuit. Under the codes of procedure, the objection must usually be raised by pleading.[13]

§ 327. *b*. Contracts made in name of one partner for the firm.—Where the contract was made in the name of one partner but for and on account of the partnership, the action should usually be brought, on simple contracts, in the name of all the partners who constituted the partnership at the time the contract was made;[14] on a simple contract in writing made in the

[8] See Pugh v. Holliday (1854), 3 Ohio St. 285.

[9] See Murray v. Murray (1821), 5 Johns. (N. Y.) Ch. 60; Browning v. Marvin (1880), 22 Hun (N. Y.) 547; Pugh v. Holliday (1854), 3 Ohio St. 285.

[10] See *In re* Meyer (1899), 39 C. C. A. 368, 98 Fed. 976; § 414.

[11] See Howell v. Reynolds (1847), 12 Ala. 128; Molen v. Orr (1884), 44 Ark. 486; Lunt v. Stephens (1845), 24 Me. 534; Tate v. Ins. Co. (1859), 79 Mass. (13 Gray) 79; Mosgrove v. Golden (1882), 101 Pa. 605.

[12] See Viles v. Bangs (1874), 36 Wis. 131; Walker v. Steel (1886). 9 Colo. 388, 12 Pac. 423; West v. Citizens Ins. Co. (1873), 27 Ohio St. 1, 22 Am. Rep. 294.

[13] See Williams v. Southern Pac. R. Co. (1895), 110 Cal. 457, 42 Pac. 974; Dodge v. Ship Co. (1869), 37 How. Pr. (N. Y.) 524, 31 N. Y. Super. Ct. 453, 6 Abb. Pr. (N. S.) 451; Molen v. Orr, *supra*.

[14] Ordinary informal dealings with

name of one partner, either the partners or the one in whose name it was made may ordinarily sue; [15] if the contract were expressly made with one partner to the exclusion of the partnership he alone must sue upon it; [16] on a contract under seal or a negotiable instrument the action must be brought in the name of the partner who was the party to it.[17]

Where the partners sue on a contract made by one partner who did not disclose the existence of the firm, the defendant may usually avail himself of any defenses which might have been open to him if the partner had sued in his own name, and which he had acquired before he knew of the interest of the partnership.[18]

one partner who was acting for the partnership would usually create rights of action in the partnership. See Creel v. Bell (1829), 2 J. J. Marsh. (Ky.) 309; De Wit v. Lander (1888) 72 Wis. 120, 39 N. W. 349; Kefauver v. Price (1918), 138 Ark. 342, 206 S. W. 664.

Where several partners ostensibly carry on business, but in the name of one of them as the firm name, all should sue. Wilson v. Wallace (1822), 8 Serg. & Rawle (Pa.) 53. An undisclosed partnership would usually stand upon the same footing as to rights of action as an undisclosed principal. (See II Mechem on Agency, § 2025); Badger v. Daenieke (1883), 56 Wis. 678, 14 N. W. 821; Curtis v. Belknap (1849), 21 Vt. 433.

15 See Curtis v. Belknap, *supra*. Partner in whose name a bill of lading has been issued may sue upon it. Mo. Pac. R. Co. v. Smith (1892), 84 Tex. 348, 19 S. W. 509. Partner in whose name insurance policy was issued may sue upon it: Mutual F. Ins. Co. v. Hammond (1899), 106 Ky. 386, 50 S. W. 545, 20 Ky. Law R. 1944; Clement v. Brit. Am. Assur. Co. (1886), 141 Mass. 298, 5. N. E. 847.

16 Where a written contract is expressly made with two named partners of a named partnership of three, the two named only may sue. Hilliker v. Francesco (1877), 65 Mo. 598. Creditor who knowingly accepts note of one partner and gets judgment upon it cannot later hold the firm. White v. Rech (1895), 171 Pa. 82, 32 Atl. 1130. Where action is based upon legal title and that is in one partner, he is proper party. Trott v. Irish (1861), 83 Mass. (1 Allen) 481. See also Law v. Cross (1861), 66 U. S. 533, 17 L. ed. 185; The Potomac (1862), 67 U. S. 581, 17 L. ed. 263.

Partner may so conduct himself as to be estopped to assert that he was acting for himself only and not for the partnership. White Mt. Bank v. West (1858), 46 Me. 15.

17 See Metcalfe v. Rycroft (1817), 6 Maule & Sel. 75; Scott v. Goodwin (1797), 1 Bos. & Pul. 67; State v. Merritt (1879), 70 Mo. 275.

18 See Gilbert v. Lichtenberg (1894), 98 Mich. 417, 57 N. W. 259.

§ 328. Actions cannot usually be brought in firm name.—As has already been noticed, actions cannot be brought by the partners in the firm name unless by virtue of a statute authorizing it. In the absence of such a statute, partners sue collectively, but as individuals. In their process and pleading it is proper, though not usually necessary, to allege that they are partners and constitute the firm named.[19]

In many states, however, there are now statutes authorizing suits in the firm name, either generally or where the individual names are not known at the time the action is commenced.

In a number of States, by statute, partners doing business in a so-called "fictitious" name[20] may not sue, though they may usually be sued.[21]

§ 329. One suing for all where partners are very numerous.—Where the partners are very numerous,—as they sometimes are in joint-stock companies,—and it would be impracticable or highly inconvenient to join them all as plaintiffs, it is sometimes provided by statute, following the practice in equity, that one or more may sue for the benefit of all.[22] A mere managing part-

19 Where the plaintiffs would be entitled to recover as joint parties merely, the failure to allege that they were partners would be immaterial; the allegation that they were partners would be surplusage; and no issue could properly be raised respecting it. See Marx v. Culpepper (1898), 40 Fla. 322, 24 So. 59; Hyde v. Ford Co. (1894), 160 Mass. 559, 36 N. E. 585; Courson v. Parker (1894), 39 W. Va. 521, 20 S. E. 583. On the other hand, there would be cases in which an allegation of partnership might be necessary to identify the plaintiffs as the promisees in the contract sued upon.

20 See *ante* § 121.

21 See Holden v. Mensinger (1917), 175 Cal. 300, 165 Pac. 950; Schwartz v. Marcuse (1917), 175 Cal. 401, 165 Pac. 1015; Axe v. Tolbert (1914), 179 Mich. 556, 146 N. W. 418; Guiterman v. Wishon (1898), 21 Mont. 458, 54 Pac. 566; Patterson v. Byers (1907), 17 Okla. 633, 89 Pac. 1114, 10 Ann. Cas. 810; Bovee v. De Jong (1908), 22 S. Dak. 163, 116 N. W. 83; McFadden v. Shanley (1914), 16 Ariz. 91, 141 Pac. 732.

22 See Platt v. Colvin (1893), 50 Ohio St. 703, 36 N. E. 735, where one member, who was also the president, was permitted to sue in Ohio for the United States Express Company, a joint stock company. In New York, where the company was organized, the statute authorized action in the name of the president. Here there were about 1,000 mem-

ner, however, has been held to have no implied authority, under this rule, to sue as the representative of all.[23]

2. *In Tort.*

§ 330. All partners must sue for torts affecting firm.—In actions for torts committed against the partners as such, such as trespass to partnership property, injury to its business, libels upon it, and the like, all of the partners must join as plaintiffs.[24] One partner alone, therefore, cannot ordinarily maintain an action to recover damages for an injury to partnership property, *i. e.*, he cannot recover alone for the joint injury, nor can he ordinarily recover separately for his share of the joint injury.[25] Where he alone had possession, he might maintain possessory actions. There can be no recovery, on the other hand, in the action by the firm, for injuries which only affect one or more partners personally.[26] Thus, for example, when suing for a libel upon the firm, the injury to the firm business is only to be recovered for in the joint action, and not the injury to the feelings of the partners personally;[27] and when suing for the

bers. But 35 are not "very numerous," *i. e.*, so numerous that it is impracticable to join them: Kirk v. Young (1856), 2 Abb. Pr. (N. Y.) 453; nor are 40, Brainerd v. Bertram (1878), 5 Abb. N. C. (N. Y.) 102. In Chancey v. May (1722), Finch's Prec. Chan. 592, there were apparently about 800.

See also McKenzie v. L'Amoureux (1851), 11 Barb. (N. Y.) 516; Wall v. Boisgerard (1848), 11 Sm. & M. (Miss.) 574; George v. Benjamin (1898), 100 Wis. 622, 76 N. W. 619, 69 Am. St. R. 963.

23 See Brainerd v. Bertram, *supra.*

24 See White v. Campbell (1893), 18 R. I. 150, 26 Atl. 40; Hughes v. Boring (1860), 16 Cal. 81; Peaks v. Graves (1888), 25 Neb. 235, 41 N. W. 151; Farnum v. Ewell (1887), 59 Vt. 327, 10 Atl. 527; Medbury v. Watson (1843), 47 Mass. (6 Metc.) 246, 39 Am. Dec. 726; Forster v. Lawson (1826), 3 Bing. 452, Burd. Cas. 303.

25 See Sindelare v. Walker (1891), 137 Ill. 43, 27 N. E. 59, 31 Am. St. R. 353, Mechem's Cas. 194, Burd. Cas. 304. See, also, White v. Campbell (1893), 18 R. I. 150, 26 Atl. 40; Bigelow v. Reynolds (1888), 68 Mich. 344, 36 N. W. 95; Reed v. Gould (1895), 105 Mich. 368, 63 N. W. 415, 55 Am. St. R. 453.

26 See Calkins v. Smith (1872), 48 N. Y. 614, 8 Am. Rep. 575.

27 See Donnell v. Jones (1848), 13 Ala. 490, 48 Am. Dec. 59; Donaghue v. Gaffy (1885), 53 Conn. 43, 2 Atl. 397. Compare Collier v. Postum Cereal Co. (1912), 150 N.

wrongful seizure of property, the seizure of the individual property of one partner is not to be considered.[28]

The same wrongful act may, of course, occasion both a partnership and an individual loss, so that a joint action for the joint wrong, and individual actions for the individual wrongs might be maintained. In the same general act there may also be duties to the partnership and other duties to the individual, for the violation of either of which an action might be brought.[29]

3. *Effect of Personal Disability.*

§ 331. Effect of disability of one partner—Recovering property wrongfully disposed of by him.—Where one partner has wrongfully disposed of partnership property, securities or money (as by using it to pay his own private debts), or has attempted, for the same purpose, to permit his own debt to be set off against a partnership demand, the question whether an action at law may be maintained to recover it or its value from the transferee is involved in dispute. It is said in many cases that no such action can be maintained,—not by the other partner alone, for the property did not belong to him alone, and he cannot even recover to the extent of his interest without an accounting;[30] and not by an action in which all of the partners, including the guilty one, are parties, for the guilty partner could not recover if he alone were involved (having consented to the act), and to allow a recovery where he is one of the plaintiffs is to permit him to profit by his own wrong.[31] The remedy

Y. App. Div. 169, 134 N. Y. S. 847 with Wills v. Jones (1898), 13 App. Cas. D. C. 482.

28 See Watts v. Rice (1883), 75 Ala. 289. Partners in a joint action may not recover for seizure of individual exemptions of each. Rogers v. Raynor (1894), 102 Mich. 473, 60 N. W. 980.

29 Where the defendant was employed to make out a firm account and also an individual one for each partner, and he made out the individual account of one so carelessly that he suffered loss, an action may be brought by that one. Story v. Richardson (1839), 6 Bing. N. C. 123.

30 See Reed v. Gould (1895), 105 Mich. 368, 63 N. W. 415, 55 Am. St. R. 453; Bumpus v. Turgeon (1904), 98 Me. 550, 57 Atl. 883; White v. Campbell (1893), 18 R. I. 150, 26 Atl. 40.

31 See Jones v. Yates (1829), 9 B. & C. 532 (by assignee of firm):

of the innocent partner, according to these cases, is either against the guilty partner alone, or in equity against him and the transferee in a forum where all rights can be adjusted.[32]

Many other cases, on the other hand, permit the action to be maintained, either in the names of all for the benefit of the innocent partner,[33] or in the latter's name alone to recover to the extent of his interest.[34] This disability would not exist where

[But see Heilbert v. Nevill (1869), L. R. 4 Com. P. 354]; Homer v. Wood (1853), 65 Mass. (11 Cush.) 62; Farley v. Lovell (1869), 103 Mass. 387; Grover v. Smith (1896), 165 Mass. 132, 42 N. E. 555, 52 Am. St. R. 506; Cornells v. Stanhope (1883), 14 R. I. 97; Greeley v. Wyeth (1838), 10 N. H. 15; Chase v. Bean (1877), 58 N. H. 183; Craig v. Hulschizer (1871), 34 N. J. L. 363; Blodgett v. Sleeper (1877), 67 Me. 499; Bumpus v. Turgeon, *supra;* Church v. First Nat. Bank (1877), 87 Ill. 68 [compare McNair v. Platt (1867), 46 Ill. 211]; Carrie v. Cloverdale (1891), 90 Cal. 84, 27 Pac. 58; Estabrook v. Messersmith (1864), 18 Wis. 545 [compare Cotzhausen v. Judd (1877), 43 Wis. 213, 28 Am. Rep. 539].

32 See Hoff v. Rogers (1889), 67 Miss. 208, 7 So. 358, 19 Am. St. R. 301.

33 See Rogers v. Batchelor (1838), 37 U. S. (12 Peters) 221, 9 L. ed. 1063; Johnson v. Crichton (1880), 56 Md. 108; Dob v. Halsey (1819), 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; Forney v. Adams (1881), 74 Mo. 138; Ackley v. Staehlin (1874), 56 Mo. 558; Nall v. McIntyre (1858), 31 Ala. 532; Buck v. Moseley (1852), 24 Miss. 170; Daniel v. Daniel (1848), 9 B. Mon. (Ky.) 195.

34 See McNair v. Wilcox (1888), 121 Pa. 437, 15 Atl. 575, 6 Am. St. R. 799; Doll v. Hennessy Merc. Co. (1905), 33 Mont. 80, 81 Pac. 625; Phillips v. Thorp (1903), 12 Okla. 617, 73 Pac. 268; Eady v. Newton Coal Co. (1905), 123 Ga. 557, 51 S. E. 661, 1 L. R. A. (N. S.) 650; as assignee of other partner, Viles v. Bangs (1874), 36 Wis. 131. See, also, Liberty Bank v. Campbell (1881), 75 Va. 534.

Where the wrongful disposal by one partner occurred after the dissolution and after all firm debts were paid, other may recover to the extent of interest: Hogendobler v. Lyon (1893), 12 Kan. 276. Where one partner fraudulently released a firm claim on receipt of a portion of it, and deposited one half of the sum so received in a bank for his copartner, the latter was permitted to recover one half of the residue. Busby v. Rooks (1904), 72 Ark. 657, 81 S. W. 1056. But in a case (not officially reported) in Kentucky, where the circumstances were similar except that the fraudulent partner kept the whole sum received, the other partners were permitted to recover the whole claim. Phoenix Ins. Co. v. Miller (1891), 13 Ky. L. Repr. 464.

one partner has acquired, *e. g.*, by assignment, the right to sue in his own name alone without joining the guilty partner.[35] So if the innocent partner survived the other, he could recover.[36]

II. PARTIES TO ACTIONS AGAINST THE PARTNERSHIP.

§ 332. Who should be sued in actions against the firm.—The question, who are proper parties defendant in actions against the partnership, presents substantially the same considerations as the question who should be plaintiffs, though the two cases are not identical.

1. *In Contract.*

§ 333. All actual and ostensible partners should be joined.—The contract obligations of the firm being joint, all of the actual and ostensible partners who were such at the date of the contract must, as a rule, be joined as parties defendant in actions on contract.[37] Failure to join them must, however, at common law, be taken advantage of by a plea in abatement,[38] unless the defect appeared upon the face of the papers, in which case the question could be raised by demurrer, motion in arrest of judgment, or writ of error.[39] This rule of joinder, however, has been changed in several states by statutes which make joint debts joint and several at the option of the obligee.[40]

As has been seen, the fact that one who was a partner when the contract was made has since retired will not of itself relieve him from liability; neither can one who was not then a partner,

35 See Brickett v. Downs (1895), 163 Mass. 70, 39 N. E. 776, Burd. Cas. 215.

36 See Binns v. Waddill (1879), 32 Gratt. (Va.) 588.

37 See Smith v. Cooke (1869), 31 Md. 174, 100 Am. Dec. 58; Sandusky v. Sidwell (1898), 173 Ill. 493, 50 N. E. 1003; Harrison v. McCormick (1886), 69 Cal. 616, 11 Pac. 456.

38 See Fogg v. Virgin (1841), 19 Me. 352, 36 Am. Dec. 757; Cleveland v. Woodward (1843), 15 Vt. 302, 40 Am. Dec. 682, Mechem's Cas. 388; Wilson v. McCormick (1890), 86 Va. 995, 11 S. E. 976.

39 See Sandusky v. Sidwell, *supra;* Sinsheimer v. Skinner Mfg. Co. (1897), 165 Ill. 116, 46 N. E. 262.

40 This seems to be the case in Alabama, Arkansas, Colorado, Georgia, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina and Tennessee.

but has since come in, be held liable unless by novation or otherwise he has assumed liability in such a way that the creditor may proceed against him at law.[41]

If the partnership was dissolved by death, then, as will be seen, legal actions usually may be brought against the survivors only, and the representatives of the deceased partner are not to be joined;[42] though recourse may usually be had in equity to the estate of the deceased partner.[43]

§ 334. — How when contract made in name of one partner.— Where a partner is known to be acting as such for a known partnership, it is the presumption that all of the ordinary, informal contracts which he makes are upon the account of the partnership, and they should be enforced in the usual manner. If, however, credit were given to him to the exclusion of the partnership, he would be the only one bound to the other party. In making formal contracts in writing, he may so stipulate as to bind himself, even though that may not have been his actual intention. On non-negotiable and simple contracts so made, the partners would also usually be liable at the option of the other party, even though so framed that the single partner might be sued alone. Dormant and secret partners are dealt with in the next section.

§ 335. Dormant and secret partners proper but not necessary parties.—Dormant and secret partners are proper but not necessary parties. If the contract were made by one partner in his own name, but really for the firm, that partner or all of the partners may be sued, if it were a simple contract; but if it were a specialty or a negotiable instrument the partner named in it as the maker of it can alone be sued upon it.[44]

The ordinary rules of agency respecting the liability of an undisclosed principal apply here.

41 See *ante*, §§ 317-321.

42 See *post*, § 402.

43 See *post*, § 411.

44 See Cleveland v. Woodward (1843), 15 Vt. 302, 40 Am. Dec. 682, Mechem's Cas. 388; North v. Bloss (1864), 30 N. Y. 374; Scott v. Conway (1874), 58 N. Y. 619; Page v. Brant (1856), 18 Ill. 37; Hatch v. Wood (1862), 43 N. H. 633; Wright v. Herrick (1878), 125 Mass. 154.

§ 336. Nominal partners. — Similarly, a nominal partner, *i. e.*, one who is not really a partner but who has caused or permitted himself to appear to the plaintiff to be a partner, is a proper but not a necessary party. He may be held, but the plaintiff may decline or omit to do so, and rely on those who are in fact the partners, if he can make a case against them.[45] If there were no actual partners or if they were not liable for the act, as for example where it was the unauthorized act of the nominal partner only, the latter alone would be liable.

§ 337. Firm as such not to be sued, except by statute.—As in the case of parties plaintiff already referred to, the firm as such is not such a legal entity as may be sued, except where some statute so declares.[46] Nor, in the absence of a statute, may actions be brought against the partners in the firm name; though statutes are common which give such a right, either generally or to sustain the action until the proper individual names can be learned and supplied.

2. *Actions of Tort.*

§ 338. Actions of tort may be brought against all or any of the partners.—Causes of action in tort for wrongs for which the partnership is responsible, whether committed by a partner or by partnership servants or agents, and not essentially consisting of a breach of a partnership contract, are not joint, but joint and several, and the suit may be brought against all or any of the partners.[47]

45 See Hatch v. Wood (1862), 43 N. H. 633; Wright v. Herrick, *supra;* Scarf v. Jardine (1882), L. R. 7 App. Cas. 345, Mechem's Cas. 484; *Ex parte* Watson (1815), 19 Ves. 459; Thayer v. Goss (1895), 91 Wis. 90, 64 N. W. 312, Mechem's Cas. 492.

46 Thus in Georgia the statute (§ 3167, Code 1911), provides: "Judgments may be entered up and execution issue in the name of the firm or against a firm. And service of process on one partner, with a return of *non est inventus* as to the others, shall authorize a judgment against the firm binding all the firm assets and the individual property of the one served."

In penal actions, proceedings should be against the partners, not against the firm as an entity. People v. Paisley (1919), 288 Ill. 310, 123 N. E. 573.

47 See Albright v. McTighe (1892), 49 Fed. 817; Wisconsin

An exception to this rule was said to exist where the action arises in respect of their common interest in land, where all ought to be joined; but this distinction was not continued under the English Partnership Act.[48]

§ 339. No action against firm as such, except by statute.—As in the preceding subdivision, no action for a tort lies against the firm as such, except by statutes; but under the Georgia statute, for example, it has been held that the partnership as a separate entity may be held liable for a tort.[49]

III. SET-OFF IN ACTIONS BY AND AGAINST THE PARTNERSHIP.

§ 340. Set-off of individual and of partnership claims.—The question whether in an action by or against the partnership there may be a set-off of individual against partnership demands and *vice versa,* is one which frequently arises, and seems to be somewhat related to the question of parties which has just been considered. The question of set-off in general is the question whether the defendant in an action may avail himself in his defense of a claim which he has against the plaintiff who is suing him, instead of bringing a separate action to enforce it. If the claim in question is one for a reduction or allowance arising out of the very transaction upon which the plaintiff sues, it is usually a matter for recoupment rather than set-off; if it

Cent. R. Co. v. Ross (1892), 142 Ill. 9, 31 N. E. 412; Creed v. Hartmann (1864), 29 N. Y. 591, 86 Am. Dec. 341; Wood v. Luscomb (1868), 23 Wis. 287; Fletcher v. Ingram (1879), 46 Wis. 191, 50 N. W. 424; Howe v. Shaw (1868), 56 Me. 291; Hess v. Lowrey (1890), 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. R. 355, Mechem's Cas. 400; Hyrne v. Erwin (1885), 23 S. Car. 226, 55 Am. Rep. 15; Rice v. Van Why (1910), 49 Colo. 7, 111 Pac. 599.

When the action, though in form in tort, is really founded upon the breach of a partnership contract, (*e. g.*, the liability of a firm of physicians under their implied contract to use skill,) the liability is joint: Whittaker v. Collins (1885), 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55; Hess v. Lowrey, *supra;* Hyrne v. Erwin, *supra.*

48 Lindley on Partnership (7th ed.), 320.

49 See Page v. Citizens Banking Co. (1900), 111 Ga. 73, 36 S. E. 418, 78 Am. St. R. 144, 51 L. R. A. 463, Mechem's Cas. 954.

arises independently and out of other transactions, it is a matter for set-off. The common law did not permit set-off in actions at law but left each party to enforce his own claim by separate legal action. This condition, however, has now been very widely changed by statutes, which permit set-off under the conditions prescribed by the statute, though the statutes differ somewhat in terms and their interpretation is not always uniform. Before these statutes, courts of equity permitted set-off in equitable actions under certain circumstances, and a distinct equitable jurisdiction of this sort is still recognized.

§ 341. —— **Under the statutes of set-off** the claim sought to be set off and the one sued upon must, in general, be mutual: they must arise between the same parties and be due in the same right. Consequently in an action by the partners, upon a partnership demand, a debt due from one partner only, or from any number less than all, cannot ordinarily be set off.[50] To do so, moreover, is to pay the individual debt of the partner out of the partnership assets, and this may not be done without the consent of the other partners. They might give such consent, in many cases, expressly or by implication,[51] though they would not be free to do so if the partnership were insolvent.

For similar reasons, if a partner sues for a debt due to him individually, the defendant may not set off a debt due him from the partnership, without the plaintiff's consent,[52] except where

[50] See Cannon v. Lindsey (1887), 85 Ala. 198, 3 So. 676, 7 Am. St. R. 38; Meeker v. Thompson (1875), 43 Conn. 77; Rush v. Thompson (1887), 112 Ind. 158, 13 N. E. 665; Jones v. Steamboat Co. (1897), 90 Me. 120, 37 Atl. 879; Payne v. O'Shea (1884), 84 Mo. 129; McDonald v. Mackenzie (1887), 24 Oreg. 573, 14 Pac. 866.

Same, where an assignee or representative of the partnership is suing: Boykin v. Persons (1891), 95 Ala. 626, 11 So. 67.

One partner alone cannot, by his agreement, change the rule: Cowen v. Hardware Co. (1891), 95 Ala. 324, 11 So. 195.

[51] Thus in Clark v. Taylor (1880), 68 Ala. 453, it is said that such a set-off may be allowed where a usage of the firm is proved establishing a clear and uniform practice to allow such set-off, or where the consent of all the partners is satisfactorily shown, citing Hood v. Riley (1835), 15 N. J. L. 127. See, also, Morgenthau v. King (1890), 15 Colo. 413, 24 Pac. 1048.

[52] See Ingols v. Plimpton (1887), 10 Colo. 535, 16 Pac. 155; Houston v. Brown (1861), 23 Ark. 333;

partnership debts are made joint and several,[53] or where the plaintiff, by assumption or otherwise, has become individually liable to pay the claim so offered as a set-off.[54]

In an action against one partner for a debt due from him individually, he may not set off a debt due from the plaintiff to the partnership,[55] unless that debt has been assigned to him,[56] or his copartners consent that he may so use it, and the rights of third persons will not be prejudiced thereby.[57]

In an action against the partners for a partnership debt, they may of course set off any claim which the partnership has against the plaintiff, but it is held that they may not ordinarily set off individual claims which they or any of them may separately have against the plaintiff;[58] though, mutuality aside, there seems to be no good reason why a partner should not thus use his individual credits to pay the partnership debts if he so desires and if his own creditors are not thereby injured, and under some statutes it has been permitted.[59]

Where there is a dormant partner that fact will not ordinarily be permitted to defeat a set-off good against the ostensible partners.[60]

The question of set-off in actions by and against the surviving partner is considered in another section.[61]

Jones v. Steamboat Co., *supra;* Jackson v. Clymer (1862), 43 Pa. 79.

53 See Allen v. Maddox (1874), 40 Iowa 124 (but see Hoyt v. Murphy (1858), 18 Ala. 316; Drennen v. Gilmore (1901), 132 Ala. 246, 31 So. 90, 90 Am. St. R. 902); Rust v. Burke (1882), 57 Tex. 341; Moody v. Willis (1867), 41 Miss. 347.

54 See Hoyt v. Murphy, *supra.*

55 Jones v. Blair (1876), 57 Ala. 457; Western Coal Co. v. Hollenbeck (1903), 72 Ark. 44, 80 S. W. 145; Olson v. Lamb (1898), 56 Neb. 104, 76 N. W. 433, 71 Am. St. R. 670; Wrenshall v. Cook (1838), 7 Watts (Pa.) 464.

56 See Hall v. Allen (1883), 80 Mo. 286.

57 See Collins v. Campbell (1902), 97 Me. 23, 53 Atl. 837, 94 Am. St. R. 458.

58 See Wilson v. Runkel (1875), 38 Wis. 526; Pinckney v. Keyler (1855), 4 E. D. Smith (N. Y.) 469; Cooley v. Sears (1861), 25 Ill. 613, (501); Beauregard v. Case (1875), 91 U. S. 134, 23 L. ed. 263.

59 See Donnell v. Portland, etc., R. Co. (1884), 76 Me. 33.

60 See Bryant v. Clifford (1854), 27 Vt. 664, Gilm. Cas. 246; Dixon Livery Co. v. Kane (1915), 117 Va. 656, 86 S. E. 106, L. R. A. 1916 A 1211; Willey v. Crocker Nat. Bank (1904), 141 Cal. 508, 75 Pac. 106.

61 See *post,* § 402, note.

§ 342. —— **Set-off in equity** is, in general, governed by the same principles of mutuality as those which prevail at law, but courts of equity will at times allow a set-off which the statutes would not permit, especially where the plaintiff is shown to be insolvent and the defendant would therefore probably not be able to collect the demand in question if he is driven to a separate action.[62]

[62] See Watts v. Sayre (1884), 76 Ala. 397; West v. Kendrick (1872), 46 Ga. 526; Hall v. Kimball (1875), 77 Ill. 161; Chamberlin v. Stewart (1837), 6 Dana (Ky.) 32; Dubrenil v. Gaither (1904), 98 Md. 541, 56 Atl. 965; Spofford v. Rowan (1891), 124 N. Y. 108, 26 N. E. 350; Seligmann v. Heller (1887), 69 Wis. 410, 34 N. W. 232.

CHAPTER XV.

OF THE DISSOLUTION OF THE PARTNERSHIP.

§ 343. Purpose of this chapter.—Having now seen something of the creation of partnership and of its incidents and consequences, attention may next be directed to the question of the dissolution of the relation, and of the consequences of such dissolution. Two expressions are here often used more or less interchangeably—dissolution and termination, though a distinction may be and often is made between them. Thus the Uniform Partnership Act defines dissolution of the partnership as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business."[1] It also declares that "on dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."[2] The same idea is sometimes expressed by distinguishing between the termination of the original relation, and the winding up of the business. For the sake of uniformity, the nomenclature of the Partnership Act will be adopted here.

§ 344. Of the methods of dissolution in general.—The methods by which the partnership relation may be dissolved may be classified under three heads: I. By the act of the parties. II. By the happening of some event. III. By decree of a court. The first of these may be further subdivided as follows: 1. By virtue of the original agreement of the parties. 2. By force of their subsequent act.

The Uniform Partnership Act[3] proceeds upon a somewhat different plan, considering first causes which result in dissolution "without violation of the agreement between the partners," such as lapse of time, accomplishment of object, mutual consent, act of one where partnership was at will, and expulsion of a member in pursuance of a power contained in the articles; next, dissolution "in contravention of the agreement of the partners," as where one partner without excuse attempts to dissolve a partnership created for a term not yet expired; then dissolution by the happening of events, like death or bankruptcy, and finally, dissolution by decree of a court.

1 Sec. 29.
2 Sec. 30.
3 Sec. 31.

I. Dissolution by Act of the Parties.

1. *Dissolution by Original Agreement.*

§ 345. **What methods included.**—The partnership may be said to be dissolved by original agreement where it comes to an end by virtue of some limitation expressly or impliedly put upon it by the parties at the time of its creation. There are three principal methods falling under this head: *a.* By lapse of time; *b.* By accomplishment of object; *c.* By the happening of some prescribed event or condition.

§ 346. —— **Dissolution by lapse of time.**—*a.* Partnership is dissolved by lapse of time where the period for its continuance was originally fixed by the agreement of the partners, and that period has elapsed. It may be continued afterwards by agreement, but this is practically the creation of a new partnership.[4]

The Uniform Partnership Act provides for this form of dissolution.[5]

§ 347. —— **Dissolution by accomplishment of object.**—*b.* Partnership comes to an end by accomplishment of its object where it was originally created for a single or temporary purpose, or a single transaction, and that purpose has been accomplished or that transaction has come to an end. Such a partnership may be continued by agreement or acquiescence, but otherwise it comes to an end.[6]

The Uniform Partnership Act provides for this form of dissolution.[7]

§ 348. —— **Dissolution upon a prescribed event or condition.**—*c.* Partnership may also come to end upon the happening of some event or the existence of some condition prescribed in the partnership agreement as one upon which the partnership shall

[4] See Phillips v. Reeder (1866), 18 N. J. Eq. 95.

[5] Sec. 31 (a).

[6] See Sims v. Smith (1858), 11 Rich. (S. C.) L. 565; Bohrer v. Drake (1885), 33 Minn. 408, 23 N. W. 840; Bank of Montreal v. Page (1881), 98 Ill. 109; Cole v. Moxley (1878), 12 W. Va. 730; Hanna v. McLaughlin (1901), 158 Ind. 292, 63 N. E. 475.

[7] Sec. 31 (a).

cease. This event or condition may be wholly self-executing, or it may merely present a situation in which, by the original agreement, one or more partners may terminate the partnership.

2. *Dissolution by Subsequent Act of Parties.*

§ 349. In general.—The dissolution of the partnership by the subsequent act of the parties may be the result of the act of all of the partners or of one. That act may be taken with the mutual consent of all, or it may be sought to be taken by one against the wish of the others.

§ 350. Dissolution by act of all—Mutual consent.—Dissolution by the act of all of the partners finds its most common form in dissolution by mutual consent. The same persons who created the partnership may dissolve it, and they may do this as well where it was originally created to endure for a fixed period, not yet expired, as where no period was fixed.[8] The same result will practically ensue where all cease or refuse to carry on the business or all unite in winding it up and dividing the assets.[9]

The Uniform Partnership Act declares that there may be dissolution, without violating the agreement between the partners, "By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking."[10]

§ 351. Dissolution by act of one partner—Partnerships at will.—The question of the power and right of one partner, or any number less than all, to dissolve the partnership depends largely upon the period for which it was created. If no term or event was fixed for its continuance, it is in law a partnership

[8] See Bank v. Page (1881), 98 Ill. 109; Wells v. Ellis (1885), 68 Cal. 243, 9 Pac. 80; Ligare v. Peacock (1884), 109 Ill. 94; Richardson v. Gregory (1888), 126 Ill. 166, 18 N. E. 777; Simpson v. Miller (1908), 51 Ore. 232, 94 Pac. 567.

[9] See Kennedy v. Porter (1888), 109 N. Y. 526, 17 N. E. 426; Simpson v. Miller, *supra*.

[10] Sec. 31 (c).

at will, and may be dissolved by any partner without liability at any time.[11]

The civil, French and Scotch law declare that the right to dissolve even a partnership at will is subject to the conditions that it shall be exercised in good faith and at a reasonable time;[12] but these limitations do not appear to be recognized by the English common law.[13]

The Uniform Partnership Act provides for dissolution "by the express will of any partner when no definite term or particular undertaking is specified."[14]

§ 352. Dissolution by act of one partner—Partnership on condition.—The partners may provide in their partnership agreement or articles that one partner shall have the right to dissolve the partnership, though formed for a definite period, by giving a stipulated notice or upon the happening of a specified event. Where such a provision is made, the partner, by acting in pursuance of it, may lawfully dissolve the partnership even though the period for which it otherwise would continue has not expired.[15]

§ 353. Dissolution by one partner when for definite period—Dissolution in contravention of partnership agreement.—If, however, the partnership was originally created to continue for a fixed period, and no provision is made for its earlier dissolution, its dissolution by one partner before that time has expired presents difficulties. The conduct of the other partners may be such as to justify a dissolution,—in which case it would

11 See Walker v. Whipple (1885), 58 Mich. 476, 25 N. W. 472; Major v. Todd (1890), 84 Mich. 85, 47 N. W. 841; Blake v. Sweeting (1887), 121 Ill. 67, 12 N. E. 67; Fletcher v. Reed (1881), 131 Mass. 312, Burd. Cas. 554; Howell v. Harvey (1843), 5 Ark. 270, 39 Am. Dec. 376, Mechem's Cas. 448; Stutt v. Lumber Co. (1906), 98 Minn. 52, 107 N. W. 824; Blaker v. Sands (1883), 29 Kan. 551; Freund v. Murray (1909), 39 Mont. 539, 104 Pac. 683, 25 L. R. A. (N. S.) 959. Compare Tankersley v. Norton (1920), — Ark. —, 218 S. W. 660, definite term implied from circumstances.

12 See Howell v. Harvey, *supra*.

13 See Story on Partnership, § 275.

14 Sec. 31 (b).

15 See Swift v. Ward (1890), 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302.

not be in contravention of the agreement,—to use the language of the Uniform Partnership Act—or it may be sought at the mere will of one partner without any justification—in which case it would be in contravention of the agreement. Although the authorities are not uniform, the true principle is probably found in the same distinction which was observed in terminating the relation of principal and agent, *i. e.*, that of the *power* to revoke as distinguished from the *right* to revoke.[16] Every partner has doubtless the *power* to withdraw from the firm and terminate the right of his partner to further bind him, at any time, even before the stipulated period, and without any other reason than his own will; but when he so revokes in violation of his agreement he subjects himself to an action for damages by his partner.[17]

§ 354. —— As has been already seen,[18] courts rarely attempt, by decrees of specific performance or otherwise, to compel reluctant persons to remain in and perform the duties of personal relations depending only upon their contract; but will leave them to their actions at law for breaches of the contract.

This does not conflict with the rule that there may be authorities given by way of security or coupled with an interest which could not be revoked. These if present, as they might be, would survive notwithstanding the dissolution of the partnership in other respects.

The Uniform Partnership Act recognizes the power of one partner to dissolve the partnership at any time, even in contravention of the agreement between the partners, where the circumstances do not permit a dissolution for any of the reasons specified in the act.[19] It also has some special provisions for safe-guarding the interests of the other partners, and subjects him to some special disabilities.[20]

§ 355. Same subject—Can there be an indissoluble partnership?—In a leading case [21] upon this subject it is said that the

16 See 1 Mechem on Agency, § 568.

17 See *ante*, § 209.

18 See *ante*, §§ 222-225.

19 Sec. 31 (2).

20 Sec. 38 (2).

21 Skinner v. Dayton (1822), 19

right of one partner to dissolve the partnership "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership, as to all future contracts, by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it."

In another case,[22] in which the foregoing language was approved, the court said: "There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases."

§ 356. ——In the Supreme Court of the United States, where both of the foregoing cases were cited, it was said: "A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, be-

Johns. (N. Y.) 513, 10 Am. Dec. 286. To same effect: Solomon v. Kirkwood (1884), 55 Mich. 256, 21 N. W. 336, Mechem's Cas. 455; Burd. Cas. 554, Gilm. Cas. 589; Mason v. Connell (1836), 1 Whart. (Pa.) 381; Slemmer's Appeal (1868), 58 Pa. St. 169, 98 Am. Dec. 255; Karrick v. Hannaman (1897), 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484; Lapenta v. Lettieri (1899), 72 Conn. 377, 44 Atl. 730, 77 Am. St. R. 315.

22 Solomon v. Kirkwood, *supra*.

cause, upon familiar principles, a partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement. But, generally speaking, neither will it interfere at the suit of the other partner to prevent the dissolution, because, while it may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed, it will seldom, if ever, specifically compel subsequent performance of the contract by either party, the contract of partnership being of an essentially personal character." [23]

§ 357. Same subject.—But this right of one partner to dissolve at will a partnership created for a fixed period has been vigorously denied. Thus, Mr. Justice Story has said: "Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner, at his mere pleasure, to violate his engagement and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation. It is no answer to say that such a violation of the engagement may entitle the injured partners to compensation in damages; for, independently of the delay and uncertainty attendant upon any such mode of redress, it is obvious that the remedy may be, nay, must be, in many cases utterly inadequate and unsatisfactory. If there be any real and just ground for the abandonment of the partnership, a court of equity is competent to administer suitable redress. But that is exceedingly different from the right of the partner, *sua sponte,* from mere caprice, or at his own pleasure, to dissolve the partnership." [24]

These views, while recognized in the English courts and some of the States,[25] have not been generally approved in this country.

[23] Karrick v. Hannaman, *supra.*

[24] Story on Partnership, § 275.

[25] One of the strongest cases on this side of the question in the

§ 358. Same subject.—Even, however, if it be conceded that the power to dissolve exists, its exercise by one who is confessedly proceeding in flat violation of his contract is not likely to receive much encouragement or aid in a court of equity; and the partner who attempts it may be left to his own resources and such aid as a court of law will give him. The unsettled condition of the law upon the subject, therefore in some States, and the fact that a dissolution, conceding the right to make it, may often be impracticable of effect without judicial assistance, render it usually desirable, if not necessary, to have recourse to a court of equity when it is sought to enforce the dissolution of a partnership created for a fixed period. The reasons which will justify this proceeding will be discussed in later sections.

§ 359. Method of dissolving by act of partner.—No particular method of dissolving a partnership by the act of a partner is necessary. Any unequivocal act which shows his determination not to continue the relationship any longer will suffice. A voluntary sale or transfer of his interest by one partner usually works a dissolution.[26]

In the absence of such a sale, an unconditional notice of the dissolution given by the partner to his partners is sufficient as between themselves. Even where the partnership was created by written instrument, or by instrument under seal, a dissolution by parol is usually held sufficient.[27]

The Uniform Partnership Act uses the phrase "by the express will" of any partner at any time.[28]

United States is, doubtless, Hannaman v. Karrick (1893), 9 Utah 236, 33 Pac. 1039 (reversed as to this point in 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484), which relied chiefly upon this position of Story, and Lindley; Ferrero v. Buhlmeyer (1867), 34 How. (N. Y.) Pr. 33; Pearpoint v. Graham (1818), 4 Wash. C. C. 232; Cash v. Earnshaw (1872), 66 Ill. 402; Van Kuren v. Trenton Co. (1861), 13 N. J. Eq. 302; Peacock v. Peacock (1809), 16 Ves. 49. See, also, McMahon v. McClerman (1877), 10 W. Va. 419.

26 See Blater v. Sands (1882), 29 Kan. 551; Wilson v. Waugh (1882), 101 Pa. 233, Mechem's Cas. 546; Carter v. Roland (1880), 53 Tex. 540.

27 See Green v. State Bank (1890), 78 Tex. 2; Swift v. Ward (1890), 80 Iowa 700, 45 N. W. 1044, 11 L. R. A. 302.

28 Sec. 31 (2).

II. Dissolution by Happening of Events.

§ 360. What here included.—In a number of cases, partnership is deemed to come to an end upon the mere happening of some event, the existence of which *ipso facto* makes the further continuance of the relation impossible, inconsistent, undesirable or illegal. What the chief of these events are will be here considered.

§ 361. Death of a partner.—Death of one partner operates to instantly dissolve an ordinary partnership, and this is usually held to be true even though the partnership articles provide for a continuance of the partnership by his executors or others, this being deemed to be really, if acted upon, the creation of a new partnership rather than the mere continuation of the old.[29] In the case of "joint stock companies" or partnerships with transferable shares the rule is often otherwise.[30]

Where there were more than two partners, the death of one not only dissolves the partnership as to him, but it dissolves the partnership between the survivors also.[31] It is, of course,

29 See Vincent v. Martin (1885), 79 Ala. 540; Exchange Bank v. Tracy (1883), 77 Mo. 594; McGrath v. Cowen (1898), 57 Ohio St. 385, 49 N. E. 338; Schmidt v. Archer (1887), 113 Ind. 365, 14 N. E. 543; Stewart v. Robinson (1889), 115 N. Y. 328, 22 N. E. 160, 163, 5 L. R. A. 410.

It is undoubtedly true, however, that statements are frequently to be found to the effect that such provisions may operate to *prevent* dissolution. See Gratz v. Bayard (1824), 11 Serg. & R. (Pa.) 41; Laughlin v. Lorenz (1864), 48 Pa. 275, 86 Am. Dec. 592; Rand v. Wright (1894), 141 Ind. 226, 39 N. E. 447, Burd. Cas. 266; Schmidt v. Archer (1887), 113 Ind. 365, 14 N. E. 543.

It is partly a matter of nomenclature and partly a question of what one is talking about. A *business* may in fact be practically continuous, though the *personnel* of its conductors may change. The *particular* group of persons who composed the partnership is unavoidably changed when one dies, no matter how automatically the group may be reconstituted afterward. See Mattison v. Farnham (1890), 44 Minn. 95, 46 N. W. 347.

30 See Willis v. Chapman (1896), 68 Vt. 459, 35 Atl. 459; McNeish v. Oat Co. (1884), 57 Vt. 316; Carter v. McClure (1897), 98 Tenn. 109, 38 S. W. 585, 60 Am. St. R. 842, 36 L. R. A. 282; Tyrrell v. Washburn (1863), 88 Mass. (6 Allen) 466.

31 See Hoard v. Clum (1883), 31 Minn. 186, 17 N. W. 275, Mechem's Cas. 444; Marlett v. Jackman

possible for the survivors to immediately form a new partnership among themselves, but it is in law and in fact a new one.

No liability would ordinarily result as between the partners because the partnership was dissolved by death before the expiration of the agreed term.

The Uniform Partnership Act recognizes this cause of dissolution.[32]

§ 362. **Bankruptcy of a partner.**—Bankruptcy of one partner—by which is meant the public or statutory condition as distinguished from mere insolvency—operates to dissolve the partnership.[33] Under the Uniform Partnership Act, the partnership is dissolved by the bankruptcy of any partner or of the partnership.[34]

As in the case of death, the bankruptcy of a partner which dissolves the partnership as to him would dissolve it also as the remaining partners if there were several.[35]

§ 363. **Assignment or seizure of partner's interest.**—Except in the case of partnerships having transferable shares, like joint stock companies and mining partnerships, the same result, *i. e.*, dissolution, has generally been thought to ensue from a partner's assignment of all of his property—including his partnership interests—for the benefit of his creditors; or from the seizure and sale of his interest at the suit of his individual creditors;[36] but the Uniform Partnership Act has changed this latter rule,[37]

(1861), 85 Mass. (3 Allen) 287, Ames' Cas. 551, Burd. Cas. 547.

[32] Sec. 31 (4).

[33] See Eustis v. Bolles (1888), 146 Mass. 413, 16 N. E. 286, 4 Am. St. R. 327, Mechem's Cas. 965, Gilm. Cas. 603; Siegel v. Chidsey (1857), 28 Pa. St. 279, 70 Am. Dec. 124; Heyman v. Heyman (1904), 210 Ill. 524, 71 N. E. 591.

[34] Sec. 31 (5).

[35] See Lewis v. United States (1875), 92 U. S. 618, 23 L. ed. 513.

[36] See Carter v. Roland (1880), 53 Tex. 540; Wilson v. Waugh (1882), 101 Pa. 233, Mechem's Cas. 546; Ogden v. Arnot (1883), 29 Hun (N. Y.) 146, Mechem's Cas. 996, Burd. Cas. 461; Morrison v. Blodgett (1836), 8 N. H. 238, 29 Am. Dec. 653.

[37] See Sec. 27, quoted in note 42. Sec. 28 (1), which provides for a charging order against a partner's share at the suit of his separate creditor (see *ante*, §§ 148, 149), may be so administered as to pay out the creditor without a dissolution; while

and such a result certainly does not always and necessarily ensue.[38] *A fortiori* where all the partners unite in making an assignment of all of the partnership property for the benefit of partnership creditors, involving an entire suspension and winding up of partnership affairs, the partnership is dissolved.[39]

§ 364. Voluntary sale of interest by one partner.—The voluntary and absolute sale of his interest by one partner, either to a third person or his partner, is also commonly said to work a dissolution *ipso facto*,[40] but it does not necessarily and always do so.[41] Such also is the Uniform Partnership Act.[42] The assignee

Sec. 28 (2) provides for redeeming from such a sale or bidding it in, either with individual funds or partnership funds on certain conditions.

[38] A variety of things may happen. The assignment or sale may not be followed up. The debt may be paid out of other property. The other partners may consent to the continuance of the business notwithstanding the loss of his interest, etc. See Wood v. American F. Ins. Co. (1896), 149 N. Y. 382, 44 N. E. 80, 50 Am. St. R. 733, Mechem's Cas. 786, Burd. Cas. 240; Riddle v. Whitehill (1890), 135 U. S. 621, 34 L. ed. 282, 10 S. Ct. 924.

In Helmore v. Smith (1887), 35 Ch. Div. 436, while one partner was temporarily incapacitated by illness his interest in the property was seized upon execution; his copartner became the purchaser and paid the amount out of firm funds and charged it to the debtor partner. On the latter's application when restored to health, *held*, no dissolution.

[39] See Wells v. Ellis (1885), 68 Cal. 243, 9 Pac. 80.

[40] See Marquand v. N. Y. Mfg. Co. (1820), 17 Johns. (N. Y.) 525; Davis v. Megroz (1893), 55 N. J. L. 427, 26 Atl. 1009; Miller v. Brigham (1875), 50 Cal. 615; Moore v. Steele (1887), 67 Tex. 435, 3 S. W. 448; Spaunhorst v. Link (1870), 46 Mo. 197 (sale to partner); Barkley v. Tapp (1882), 87 Ind. 25; Allen v. Logan (1888), 96 Mo. 591, 10 S. W. 149 (sale to a stranger); Simpson v. Miller (1908), 51 Oreg. 232, 94 Pac. 567 (sale to partner).

[41] See Taft v. Buffum (1833), 31 Mass. (14 Pick.) 322; Waller v. Davis (1882), 59 Iowa 103, 12 N. W. 798. Of course, a mere mortgage of his interest by one partner does not at once necessarily dissolve the partnership.

In case of mortgage by one partner to another of his interest, see Monroe v. Hamilton (1877), 60 Ala. 226, Burd. Cas. 306.

[42] The Uniform Partnership Act, sec. 27, provides: "(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to

of the interest, of course, does not automatically become a partner: the *delectus personarum* prevents that, as does also the Uniform Partnership Act; he is at most a tenant in common. But he has a right to get out the value of what he has purchased.[43] The other partners cannot ordinarily be expected to retain as a partner one who has no longer any pecuniary interest in the business, and who would usually not be liable for future debts. They have therefore usually a strong motive to treat the partnership at an end, and would ordinarily have an unquestioned right to do so. But it is not impossible for them to waive the objections and continue the relation. If the partner in question not only sells out but goes out, a dissolution will result.

A sale of his interest by a partner in a partnership having transferable shares of course stands upon a different footing.

§ 365. Insanity of a partner.—Although opinions have differed upon the subject, and there is some authority for saying that an adjudication of insanity *ipso facto* works a dissolution,[44] the rule seems now to be settled that the insanity of one partner does not of itself work a dissolution of the firm, but may constitute sufficient ground to justify a court in decreeing a dissolution.[45]

§ 366. Marriage of partner.—Marriage of a female partner to a non-partner, at common law, but not under most of the modern statutes, would operate to dissolve the partnership. Even

require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled. (2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

43 See the Uniform Partnership Act, Sec. 27, above.

44 See Isler v. Baker (1845), 25 Tenn. (6 Humph.) 85.

45 See Raymond v. Vaughn (1889), 128 Ill. 256, 21 N. E. 566, 15 Am. St. R. 112, 4 L. R. A. 440, Gilm. Cas. 595. Compare, incapacity by paralysis, Barclay v. Barrie (1913), 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, Ann. Cas. 1913 D 1143.

under such statutes, if a male and a female partner intermarry the partnership would, in many states, be thereby dissolved.[46]

§ 367. Guardianship of a partner.—Guardianship of one partner, by virtue of which the management of his property is taken from him, operates probably to dissolve the partnership, and at all events would, like insanity, be a ground for decreeing a dissolution.[47]

§ 368. Expulsion of a partner.—Partners have no inherent right to expel another, no matter by what majority; but it is competent to provide in the partnership articles for the compulsory withdrawal of a partner upon conditions prescribed. Such provisions are common in English practice, but rare in this country. They would need to be explicit, and must be at least substantially pursued. The Uniform Partnership Act[48] declares that dissolution is caused "by the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners."

§ 369. War.—War between the countries of which the partners are respectively citizens at least suspends, and ordinarily works a dissolution of, a commercial partnership.[49] The partners are now public enemies of each other and all commercial dealings between them are unlawful.

So a war in the country in which the business is to be conducted, even though the partners themselves are not citizens of enemy countries, may make impossible or illegal the further prosecution of the business in that country.

[46] See Brown v. Chancellor (1884), 61 Tex. 437; Bassett v. Shepardson (1883), 52 Mich. 3, 17 N. W. 217, Burd. Cas. 553; Little v. Hazlett (1900), 197 Pa. 591, 47 Atl. 855. See, also, *ante*, § 52.

[47] See Parsons on Partnership, § 303.

[48] Sec. 31 (d).

[49] See Bank of New Orleans v. Matthews (1872), 49 N. Y. 12, Mechem's Cas. 962; Stevenson v. Aktiengesellschaft, etc. [1917], 1 K. B. 842, 7 Br. Rul. Cas. 600; Wood v. Wilder (1870), 43 N. Y. 164, 3 Am. Rep. 684; Hubbard v. Matthews (1873), 54 N. Y. 43, 13 Am. Rep. 562; Griswold v. Waddington (1818), 16 Johns. (N. Y.) 438, 491, 15 id. 57, Burd. Cas. 544, Gilm. Cas. 600.

§ 370. Illegality.—An event, like a change of status or a change of law, which made illegal the further prosecution of a business formerly legal, or which made it illegal for the particular partners to continue to carry on a business which it was formerly lawful for them to conduct, would ordinarily dissolve the partnership.[50]

The Uniform Partnership Act is to the same effect.[51]

§ 371. Happening of a stipulated event.—So the mere happening of some particular event which the parties by their contract have specified may, by the terms of that contract, either *ipso facto* dissolve the partnership,[52] or furnish ground for its dissolution by the act of a partner.

§ 372. Reorganization—Incorporation.—A partnership is not necessarily terminated merely by the fact that the members of it form another partnership or become members of a corporation.[53] If that particular partnership were reconstituted in such a way as to work a fundamental change in it—as if new members were admitted, the purpose changed, and the like,—there would doubtless result a dissolution of the partnership. So if that particular business were incorporated, a dissolution of the partnership would usually result.[54] So it would, in fact, if the capital, property and business of the partnership were transferred to the corporation and the partnership enterprise was abandoned.[55]

50 See Justice v. Lairy (1898), 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. R. 405, holding that where the statute makes it unlawful for a judge to practice law, an existing law firm is dissolved if one of the members later accepts the office of judge.

51 See sec. 31 (3).

52 See Smith v. Vandenburg (1867), 46 Ill. 34.

53 See Goddard v. Pratt (1835), 33 Mass. (16 Pick.) 412; Howe v. Thayer (1835), 34 Mass. (17 Pick.) 91; Weise v. Gray's Harbor Commercial Corporation (1904), 111 Ill. App. 647; Seufert v. Gille (1910), 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471; Southwick v. Allen (1839), 11 Vt. 75; First Nat. Bank v. Conway (1886), 67 Wis. 210, 30 N. W. 215; Pearce v. Sutherland (1908), 90 C. C. A. 519, 164 Fed. 609.

54 See Hennessy v. Griggs (1890), 1 N. Dak. 52, 44 N. W. 1010.

See, also, Cavasso v. Downey (1920), — Cal. App. —, 188 Pac. 594.

55 See Coggswell, etc., Co. v.

It is, of course, a different question, reserved for the following chapter, what notice, if any, of such a change must be given, and to whom.

III. DISSOLUTION BY JUDICIAL DECREE.

§ 373. Declaring void.—Before taking up the question of dissolution by decree, the present seems a convenient place for mentioning a remedy in the same line, but of far more extensive effect. Thus, instead of *dissolving* the partnership and thereby terminating it from the date of the decree, a court of equity may find sufficient ground for rescinding the contract of partnership altogether and declaring the partnership void *ab initio.* This may be done where one partner has been induced through fraud, deception or oppression to enter into the partnership in the first instance.[56] "Where a person is induced," says Mr. Justice Lindley,[57] "by the false representations of others to become a partner with them, the court will rescind the contract of partnership at his instance; and will compel them to repay him whatever he may have paid them, with interest, and to indemnify him against all the debts and liabilities of the partnership, and, if the defendants have been guilty of fraud, against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern."

The Uniform Partnership Act contains specific provisions as

Coggswell (1898), — N. J. Eq. —, 40 Atl. 213.

56 See Adam v. Newbigging (1888), 13 App. Cas. 308; Newbigging v. Adam (1886), L. R. 34 Ch. Div. 582; Mycock v. Beatson (1879), 13 Ch. Div. 384; Fogg v. Johnston (1855), 27 Ala. 432, 62 Am. Dec. 771; Howell v. Harvey (1843), 5 Ark. 270, 39 Am. Dec. 376, Mechem's Cas. 448; Oteri v. Scalzo (1891), 145 U. S. 578; Hynes v. Stewart (1850), 10 B. Mon. (Ky.) 429; Smith v. Everett (1879), 126 Mass. 304, Gilm. Cas. 608; Richards v. Todd (1879), 127 Mass. 167; Grossman v. Lewis (1917), 226 Mass. 163, 115 N. E. 236; Harlow v. La Brum (1897), 151 N. Y. 278, 45 N. E. 859; Gathright v. Fulton (1917), 122 Va. 17, 94 S. E. 191.

57 Lindley on Partnership, vol. II (Ewell's ed.), 482.

to the rights of the defrauded partner which will be found in the footnote.[58]

§ 374. Dissolving in equity.—Many causes, however, may exist which will justify a dissolution of the firm which would not suffice to render the partnership void *ab initio.*

Of the causes for which a court will thus decree a dissolution several examples may be given. The courts of law, it may be noticed, have no jurisdiction for this purpose, and the relief can be sought only in equity. The grounds for the intervention of the court are usually acts occurring since the formation of the partnership, but they may be acts or events preceding its formation. The occasion for seeking a dissolution in a court of equity arises usually only in those cases in which it was to continue for a definite term not yet expired, because, as has been seen, a partnership at will merely is ordinarily dissolvable at any time by the mere act of the parties.[59]

The fact that the articles provide for dissolution upon notice given by one partner to the other does not prevent an application to a court of equity for dissolution.[60]

§ 375. Causes for dissolution—Fraud.—Fraud in the creation of a partnership, as has been seen, may be a sufficient ground for a rescission of the contract, but it may also be treated as a reason for decreeing a dissolution.[61]

58 Sec. 39. "Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) To a lien on, or right of retention of, the surplus of the partnership property, after satisfying the partnership liabilities to third persons, for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership."

59 See *ante,* § 351.

60 Adams v. Shewalter (1894), 139 Ind. 178, 38 N. E. 607.

61 See Oteri v. Scalzo (1891), 145 U. S. 578, 12 Sup. Ct. 895, 36 L. ed.

§ 376. —— Insanity or incapacity of partner.—The insanity or other physical incapacity of one partner, while not usually sufficient of itself, as has been seen, to terminate the partnership as matter of law, will, if of such a character as to permanently disable the partner afflicted from performing the duties of the partnership, be sufficient ground for decreeing a dissolution.[62]

§ 377. —— Misconduct of a partner.—The misconduct of one partner (not the one praying for relief), if of such a kind and degree as to render the further prosecution of the partnership inexpedient, injurious or impossible, may be ground for decreeing its dissolution. Courts will not interfere upon every disagreement between the partners, nor "enter into a consideration of mere partnership squabbles,"[63] but they will interfere where the misconduct of one partner or the dissension between the parties is so serious as to endanger the prosperity of the firm or destroy the confidence which must exist between partners. Thus, abandonment of the business by one partner, his persistent violation of the articles, excluding his copartner from participation, repudiating his interest, dishonesty, gross misconduct, habitual drunkenness, and the like, have been held sufficient.[64]

§ 378. —— Must not be misconduct of partner seeking dissolution.—But the partner who is himself at fault will not be

824; Rosenstein v. Burns (1882), 41 Fed. 841; White v. Smith (1897), 63 Ark. 513, 39 S. W. 555.

62 See Barclay v. Barrie (1913), 209 N. Y. 40, 102 N. E. 602, 47 L. R. A. (N. S.) 839, and note, Ann. Cas. 1913 D 1143; Raymond v. Vaughn (1889), 128 Ill. 256, 21 N. E. 566, 15 Am. St. R. 112, 4 L. R. A. 440; Jurgens v. Ittmann (1895), 47 La. Ann. 367, 16 So. 952, Burd. Cas. 558; Sayer v. Bennet (1783), 1 Cox 107; Whitwell v. Arthur (1865), 35 Beav. 140; Jones v. Noy (1833), 2 M. & K. 125.

63 See Cash v. Earnshaw (1872), 66 Ill. 402, Gilm. Cas. 605; Gerard v. Gateau (1876), 84 Ill. 121, 25 Am. Rep. 438, Mechem's Cas. 460.

64 See Seighortner v. Weissenborn (1869), 20 N. J. Eq. 172; Rosenstein v. Burns (1882), 41 Fed. 841, Burd. Cas. 557; New v. Wright (1870), 44 Miss. 202, Mechem's Cas. 319; Moore v. Price (1896), 116 Ala. 247, 22 So. 531; Groth v. Payment (1890), 79 Mich. 290, 44 N. W. 611; Cottle v. Leitch (1868), 35 Cal. 434; Holladay v. Elliott (1879), 8 Oreg. 84; Harrison v. Tennant (1856), 21 Beav. 482; Essel v. Hayward (1860), 30 Beav. 158.

permitted to make use of his own misconduct to secure a dissolution. "A party who is the author of the ill-feeling between himself and his partners," said the court in one case,[65] "ought not to be permitted to make the relation he has induced the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty."

§ 379. —— Irreconcilable discord.—Even though both parties are at fault—and often without attempting to appraise their respective demerits—it may be found that such a condition of irreconcilable discord and dissension has developed between the partners as to make any reasonable and successful prosecution of the business impossible; and the court may decree a dissolution on that ground.[66]

§ 380. —— Impossibility of success.—So, though there be no misconduct, if the further prosecution of the partnership with profit or success has become impossible or impracticable, if its purpose or object has become unattainable, if it is found that the scheme or theory upon which the partnership was based was illusory or erroneous,—in these and like cases the court may decree its dissolution, as it is not to the advantage of any one that the business should be continued under such circumstances.[67]

§ 381. —— Under Uniform Partnership Act.—The provisions of the Uniform Partnership Act are substantially the same as those already existing under the general law,[68] and it is assumed

[65] Gerard v. Gateau (1876), 84 Ill. 121, 25 Am. Rep. 438, Mechem's Cas. 460. See, also, Fairthorne v. Weston (1844), 3 Hare 387.

[66] See Singer v. Heller (1876), 40 Wis. 544; Whalen v. Stephens (1901), 193 Ill. 121, 61 N. E. 921.

[67] See Rosenstein v. Burns (1882), 41 Fed. 841, Burd. Cas. 557; Holladay v. Elliott (1878), 8 Oreg. 84; Willis v. Chapman (1896), 68 Vt. 459, 35 Atl. 459; Jennings v. Baddeley (1856), 3 K. & J. 78.

[68] Sec. 32 (1) "On application by or for a partner the court shall decree a dissolution whenever:

that they would be subject to the same qualifications, *e. g.*, that the partner by or for whom the application is made shall not be the one guilty of the misconduct.

This Act also provides for dissolution by decree of court on the application of the purchaser of a partner's interest,[69] under conditions which doubtless represent existing law.

§ 382. Receivership in these cases.—As has already been seen,[70] dissolution by judicial decree offers also the occasion in many cases for the appointment of a receiver, and other forms of incidental relief.

(*a*) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind.

(*b*) A partner becomes in any other way incapable of performing his part of the partnership contract.

(*c*) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business.

(*d*) A partner wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him.

(*e*) The business of the partnership can only be carried on at a loss.

(*f*) Other circumstances render a dissolution equitable."

69 Sec. 32 (2) "On the application of the purchaser of a partner's interest under sections 28 or 29:

(*a*) After the termination of the specified term or particular undertaking.

(*b*) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued."

70 See *ante*, § 231.

CHAPTER XVI.

OF NOTICE OF THE DISSOLUTION.

§ 383. In general.—The formation of a partnership, as has been seen, results in the creation of a relationship between the parties by virtue of which they acquire certain rights and privileges, and come under certain duties and obligations, with respect of one another; and also confer upon each other certain authority to enter into business relations with third persons by which all of the partners are to be bound. If now this relationship is to be broken up, it is obvious that notice of that fact (where not self-evident or otherwise declaratory) should be brought home both to the partners themselves and also to the third persons who have been invited to rely on the authorities resulting from it. There must be considered, therefore, the necessity of notice: I. To the partners themselves; and II. To non-partners.

I. NOTICE TO PARTNERS.

§ 384. On dissolution by act of a partner.—Where the partnership is terminated by the act of a partner, whether it be a partnership at will or one for a definite time, it is ordinarily incumbent upon such partner to notify his copartners of that fact, and the termination would ordinarily not be deemed legally effected until such notice was given.[1] Notice would ordinarily be necessary to terminate the agency of the other partners to bind the one seeking to dissolve the partnership. His secret intention, concealed in his own mind, or his purely *ex parte* acts, would have no effect.

In many cases, the act itself by which the relationship is terminated would *ipso facto* give notice, as, *e. g.*, where he sells out to his copartners, or sells to a third person whom the other partners contemporaneously admit to the partnership in his place.

§ 385. On dissolution by happening of events. — Where the partnership is dissolved by one of those events which, like death, bankruptcy, war, change of law, and the like, operate to terminate the ordinary partnership, no notice of that fact could usually be required from one partner to another, because ordinarily one would have as much opportunity for notice in fact as another. There might well be cases, however, in which one partner, who had actual notice of such a fact which he knew his copartner did not have, would be deemed to be under a legal duty to inform him.

§ 386. Under Uniform Partnership Act.—With respect of the right of a partner to contribution from his copartners for lia-

1 Thus, in Eagle v. Bucher (1856), 6 Ohio St. 295, 67 Am. Dec. 342, it is said: "That a partnership may be dissolved by the act of one of the partners we do not * * * intend to impugn. That is too well settled to be now questioned. But to effect that purpose, the act must be done with a view to its accomplishment. It should be communicated at once to the other members of the firm. They should be advised of the new relations created by the withdrawal of a member, or a transfer of his interest in the concern. Their future relations toward each other, and their pursuit of the particular enterprise, depend on the acquisition of such knowledge." See, also, Abbot v. Johnson (1855), 32 N. H. 9; Jones v. Lloyd (1874), L. R. 18 Eq. 265, 271.

bilities or expenses incurred by him after dissolution, the Uniform Partnership Act,[1] confessedly to some extent changing the present law, provides that "where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved, unless

(*a*) The dissolution being by act of any partner, the partner acting for the partnership had *knowledge* of the dissolution, or

(*b*) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had *knowledge* or *notice* of the death or bankruptcy" as those terms are defined by the Act.

II. Notice to Third Persons.

§ 387. The necessity of notice to them.—The creation of a partnership and the transaction of its business are notice to the public that a relation has been entered into to which the law attaches certain incidents and liabilities. As a business venture it is ordinarily an invitation to third persons to deal upon the credit of the persons and the funds assembled for that purpose in the partnership. It seeks to establish good-will and habits of dealing. To be successful, the invitation to rely must usually be a continuing one. If this relation is terminated, it would seem to be a natural consequence that some notice of the fact should also be given, if it is desired to bring those incidents and liabilities to an end. And notice is required by law in many cases. We are now to consider when notice is required to third persons, to whom, and how it may be given.

§ 388. In what cases notice is required—Not on dissolution by mere operation of law.—As has been seen, the dissolution may result either from the operation of the law or by the act of the parties. The causes which will operate to dissolve the partnership by mere operation of law have been considered, and it is obvious that the existence of these causes is usually accom-

[1] Sec. 34.

panied by facts and circumstances which must of themselves give publicity to the event. Thus, the fact that one of the partners has died is usually, if not always, accompanied by circumstances which must give publicity to the fact. The same is true of the bankruptcy of a partner, or the declaration of war between the countries of which partners respectively are citizens. Moreover, upon such death or bankruptcy new parties acquire interests in the property of the decedent or the bankrupt which can not be affected by the future acts of the former partners. The result of this necessary and inherent publicity is the general rule that no notice is required where the partnership is dissolved upon the happening of one of the events which terminate a partnership by mere operation of law.[2] Such has, in fact, been held to be the rule in the case of dissolution by death, bankruptcy, war, and the marriage of a female partner. Change in the law, making the partnership thereafter illegal, must stand upon the same footing. Such, also, it is commonly said, is the case of dissolution by judicial decree: third persons must take

[2] See Griswold v. Waddington (1818), 15 Johns. (N. Y.) 57, 16 id. 438; Marlett v. Jackman (1861), 85 Mass. (3 Allen) 287; Bank v. Matthews (1872), 49 N. Y. 12, Mechem's Cas. 962; Eustis v. Bolles (1888), 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. 286, Mechem's Cas. 965. In this last case it is said: "The bankruptcy, like the death of a partner, dissolves the partnership; and, as it is a public and notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings is legal notice to all persons by which they are bound. Story on Partnership, secs. 332-336; Arnold v. Brown, 24 Pick. (Mass.) 89, 94, 35 Am. Dec. 296; Marlett v. Jackman, 3 Allen (Mass.) 287, Ames' Cas. 551, Burd. Cas. 547; Butler v. Mullen, 100 Mass. 453."

In Hudson Real Estate Co. v. Tower (1894), 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379, it is said: "Death is a public fact, of which all the world must take notice, * * * but insanity is not." The last statement, however, was not made concerning an adjudication of insanity.

Where partnership is dissolved by war, no notice is required: Bank v. Matthews, *supra;* Griswold v. Waddington, *supra.* So held also in case of dissolution by marriage of a female partner: Little v. Hazlett (1900), 197 Pa. 591, 47 Atl. 855. An assignment for the benefit of creditors is not an act of which all persons are charged with notice: Kuser v. Wright (1894), 52 N. J. Eq. 825, 31 Atl. 397.

notice,[3] though where disconnected with an adjudication as to property this seems not so clear.

The doctrine, it is said, does not extend so far as to require one to take notice of the decrees of courts of other states.[4]

The Uniform Partnership Act, as to death and bankruptcy at least, repudiates this rule of imputed notice in case of death or bankruptcy, clearly as between the partners,[5] and, apparently, as to third persons also.[6]

§ 389. —— Required on dissolution by or through act of parties.—But in the case of a dissolution by or through the act of the partners, no such publicity is necessarily incident and therefore a different rule prevails. In such cases, whether the partnership comes to an end by lapse of time or by mutual consent, or by the act of one of the partners, notice must usually be given.

§ 390. To whom notice required.—Notice may be required for two purposes and to two classes of persons:

1. If a partner intends to dissolve the partnership in pursuance of his power to do so, he must, as has been seen in the preceding subdivision, usually give his partners notice of that fact, both as a means to the dissolution, and also for the purpose of withdrawing the powers conferred upon them at the time the partnership was created.

2. But the question most frequently arising, and the one giving most difficulty, is the question of notice to third persons. Of these there are two classes: those who have had previous

[3] Thus there is frequently cited the statement of Adams' Equity, 157: "For it is presumed that legal proceedings, during their continuance, are publicly known throughout the realm." See Mining Co. v. Anglo-Calif. Bank (1881), 104 U. S. 192, 26 L. ed. 707.

[4] The *realm* referred to in the rule quoted, in proceedings concerning property, means the state where the property is. Carr v. Lewis Coal Co. (1888), 96 Mo. 149, 9 Am. St. R. 328, 8 S. W. 907. See also Shelton v. Johnson (1857), 4 Sneed (Tenn.) 672, 70 Am. Dec. 265 (a case concerning property).

[5] Sec. 34. The commissioners, in their note to this section, avow the purpose to make this change as between the partners themselves.

[6] Sec. 35 makes no exception of dissolution by such events.

dealings with the firm and relied upon its credit, and those who have not. The former have necessarily knowlege of the existence of the firm, and have had occasion to rely upon the credit of its members, while the latter have not necessarily known of it, and have been brought into no personal relation with it. Notice to both classes may perhaps be necessary—to the former because they have already known and trusted to the partnership and are therefore likely to continue to do so; to the latter because if they do not already know of its existence or have not dealt with it, they may hereafter deal in reliance upon it and be deceived by supposing it to continue; but the same kind of notice is not required for both classes. Thus—

§ 391. How notice given—1. To those who have given credit to the firm.—Persons of the first class, having had actual notice of the existence of the partnership, and having given credit to it,—frequently spoken of as "former dealers,"—should be given actual notice of its dissolution.[8] It is not very material how the

[8] Uniform Partnership Act, sec. 35 (1*b* I), uses the language: "Had extended credit to the partnership prior to the dissolution and had no knowledge or notice of the dissolution." This would exclude, *e. g.*, the case in which the first dealings were after dissolution, and then, before notice, the dealing in question.

A "former dealer" within the meaning of the rule requiring actual notice is one who has extended credit to the firm: 2 Bates on Partnership, § 613. The term does not include one who has previously merely purchased goods from the firm: Askew v. Silman (1895), 95 Ga. 678, 22 S. E. 573, Mechem's Cas. 474, Burd. Cas. 106 (though the Georgia Code requires that notice shall be given "to creditors").

A single former transaction *may* be enough. Block v. Price (1887), 32 Fed. 562; Lyon v. Johnson (1859), 28 Conn. 1, Gilm. Cas. 341; Thayer v. Goss (1895), 91 Wis. 90, 64 N. W. 312, Mechem's Cas. 492; but compare Merritt v. Williams (1876), 17 Kan. 287, where a *habit* of dealing is said to be necessary.

The question does not turn upon the amount of the dealing: Clapp v. Rogers (1855), 12 N. Y. 283. A single sale of goods to the firm *for cash* is not enough: Clapp v. Rogers, *supra;* Merritt v. Williams, *supra.*

Ordinarily the dealing must be with the firm directly, and it is not enough, for example, that the plaintiff has taken, from others, paper upon which the firm was a maker or endorser: Hutchins v. Bank of Tennessee (1847), 8 Humph. (Tenn.) 418; *per* Verplanck, Senator, in Vernon v. Manhattan Co. (1839), 22 Wend. (N. Y.) 183; Rocky Mt. Nat. Bank v. McCaskill (1891), 16 Colo. 408, 26 Pac. 821. Cases may easily

notice is given or by whom; the important thing is that they receive it.

In one case,[9] after referring to the method of giving notice to strangers, the court said: "The rule is different in respect to persons who have dealt with the firm before the dissolution. The rule in such cases in this state requires that, to relieve a retiring partner from subsequent transactions in the partnership name, notice of the dissolution must be brought home to the persons giving credit to the partnership. If, in any way, by actual notice served, or by seeing the publication of the dissolution, or by information derived from third persons, the party, at the time of the dealing, is made aware of the fact that the partnership has been dissolved, the contract will not bind the firm. It is sufficient to exempt the firm from liability that the person so contracting with a partner in the firm name knew or had reason to believe that the partnership had been dissolved, but this must appear and be found by the jury, or else the contract will be treated as the contract of the partnership."

§ 392. —— A common method of giving the notice is by personal communication or by letter or circular addressed to and received by all persons who have given credit to the firm. Mailing the notice, properly addressed, raises a presumption of its due receipt, but the presumption is not conclusive and, if rebutted, actual receipt must be shown.[10] Mere publication in a newspaper is obviously not enough; it must appear further that the party to be notified saw it or otherwise knew of it.[11]

be imagined, however, in which the contrary would doubtless be held, as, for example, where the intermediate party was merely an agency for reaching the real creditor. See Grinnan v. Baton Rouge Mills Co. (1852), 7 La. Ann. 638, Mechem's Cas. 968.

Within what time the previous dealing must have been had seems not to be settled, but certainly notice must be given to those who have extended credit within a time so recent as to reasonably justify the inference that the firm still continues.

9 Austin v. Holland (1877), 69 N. Y. 571, 25 Am. Rep. 246, Mechem's Cas. 464, Gilm. Cas. 343. In this case it was held that the mere mailing of a notice of dissolution was not sufficient; it must be received.

10 Meyer v. Krohn (1885), 114 Ill. 574, 2 N. E. 495; Young v. Clapp (1892), 147 Ill. 176, 32 N. E. 187, 35 N. E. 372.

11 Notice of dissolution was published in a paper and a copy of the

Notice to or by an agent will suffice if the receipt or the giving of it respectively was within the scope of his authority.[12] The lack of notice to the agent who has the knowledge of the partnership and who has had the previous dealings, may at times avail the principal.[13]

The Uniform Partnership Act[14] defines "knowledge" as either actual knowledge of the fact or knowlege of such other facts as would indicate bad faith if he proceeded; while "notice" is either a direct statement to the person or a written statement delivered through the mail or by other means of communication.

§ 393. How notice given—2. To those who have not given credit to the firm.—Of the persons who have not given credit to the firm, there are likewise two classes—those who knew of the partnership but had not dealt with it, and those who did not know of it, prior to its dissolution. As to the latter class, it is said that no notice at all is necessary,[15] upon the

paper with a red line drawn about the notice was mailed to a former dealer residing in another town. *Held* not alone sufficient: Haynes v. Carter (1873), 12 Heisk. (Tenn.) 7, 27 Am. Rep. 747, Mechem's Cas. 966. Proof of the publication of the notice in a newspaper is not sufficient where it is not shown that the other party either took or read the paper: Rose v. Coffield (1879), 53 Md. 18, 36 Am. Rep. 389, Mechem's Cas. 469, Gilm. Cas. 346. Even though he was a subscriber for the paper, it is not enough if he shows that he did not see the notice: Askew v. Silman (1895), 95 Ga. 678, 22 S. E. Rep. 573, Mechem's Cas. 474. But it has been held to be a fact from which the jury might, otherwise at least, infer actual notice; Treadwell v. Wells (1854), 4 Cal. 260. Mere publication is not enough: Robinson v. Floyd (1893), 159 Pa. 165, 28 Atl. 258. See, also, Nicholson v. Moog (1880), 68 Ala. 471; Stoddard Mfg. Co. v. Krause (1889), 27 Neb. 83, 42 N. W. 913; Long v. Garnett (1883), 59 Tex. 229; Gilchrist v. Brande (1883), 58 Wis. 184, 15 N. W. 817; Backus v. Taylor (1882), 84 Ind. 503; Sibley v. Parsons (1892), 93 Mich. 538, 53 N. W. 786.

12 See Marsh v. Wheeler (1904), 77 Conn. 449, 59 Atl. 410, 107 Am. St. R. 40; Neal v. Smith (1902), 54 C. C. A. 226, 116 Fed. 20.

13 See Haines v. Starkey (1901), 82 Minn. 230, 84 N. W. 910, Mechem's Cas. 974.

14 Sec. 3.

15 See Austin v. Appling (1891), 88 Ga. 54, 13 S. E. 955; Benjamin v. Covert (1879), 47 Wis. 375, 2 N. W. 625; First Inter. Bank v. Brown (1915), 130 Minn. 210, 153 N. W. 522; Chamberlain v. Dow

ground that, as they did not learn of the existence of the partnership until it had actually been dissolved, they could not have been misled by prior appearances or influenced by former habits of reliance; and therefore they could have no reason for holding it liable; and this is doubtless correct where no element of estoppel is involved,[16] though notice by publication, even in such cases, would be the safer course. As to the former, "general" notice is enough, and this notice may be given in a variety of ways, though publication for a reasonable period in a newspaper of general circulation at the place where the partnership business is carried on is deemed the most effectual and appropriate.[17]

The English Partnership Act provides for publication in the "Gazette," but there is no corresponding official publication in this country.

(1862), 10 Mich. 319; Swigert v. Aspden (1893), 52 Minn. 565, 54 N. W. 738, Mechem's Cas. 971. In the last case it is said: "It is obvious that such creditors act wholly upon their present information of the firm and its members, and not at all upon their past knowledge."

16 See Benjamin v. Covert, *supra*. Here it appeared that a business had been carried on in the name of A. C. His brother, G. C., had in fact been a partner, and was generally believed and reputed in the neighborhood to be a partner, but he had withdrawn from the business, giving no notice, and A. C. was conducting the business alone. A. C. applied to plaintiff for credit. Plaintiff had had no previous dealings with him and had never heard of any partnership. A. C. told plaintiff that G. C. was his partner and was financially responsible. Plaintiff took time to look the matter up and upon inquiry learned that G. C. was generally reputed to be a partner. He thereupon gave credit to what he believed to be a partnership of A. C. and G. C. doing business in the name of A. C. *Held,* that evidence of these facts was competent, and that G. C. might be liable upon the ground that by giving no notice of his retirement he was acquiescing in the continuance of the reputation of his being a partner, which reputation he knew of.

Where a contemplated partnership was abandoned before any business had been done under it, it was held that no notice was necessary to one who had had no knowledge of it but who had later dealt with the other proposed partner. Chamberlain v. Dow, *supra*.

17 In New York this was said to be "the only safe rule": Citizens Nat. Bank v. Weston (1900), 162 N. Y. 113, 56 N. E. 494. See, also, Bank v. Weston (1899), 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547.

§ 394. ——Where there is no newspaper available—as in the case of partnerships located in small or remote places—some other method of giving general notice *must* be adopted; but even where there is a newspaper, it is not generally held to be imperative that it should be used. Other methods *may* suffice if they are reasonably adapted to the purpose, which is, to apprise generally that "public" which had notice of the partnership that it no longer exists.[18] Even though no method of giving

[18] Thus, in Lovejoy v. Spafford (1876), 93 U. S. 430, 440, Mechem's Cas. 977, 23 L. ed. 851, it is said: "We think it is not an absolute, inflexible rule that there must be a publication in a newspaper to protect a retiring partner. That is one of the circumstances contributing to or forming the general notice required. It is an important one, but it is not the only or an indispensable one. Any means that, in the language of Mr. Bell, are fair means to publish as widely as possible the fact of dissolution, or which, in the words of Judge Edmonds, are public and notorious to put the public on its guard; or, in the words of Judge Nelson, notice in any other public and notorious manner; or, in the language of Mr. Verplanck, notice by advertisement or otherwise, or by withdrawing the exterior indications of partnership, and giving the public notice in the manner usual in the community where he resides, are means and circumstances proper to be considered on the question of notice." See, also, Ellison v. Sexton (1890), 105 N. C. 356, 18 Am. St. Rep. 907, 11 S. E. 180; Polk v. Oliver (1879), 56 Miss. 566; Richards v. Butler (1880), 65 Ga. 593; Central Nat. Bank v. Frye (1889), 148 Mass. 498, 20 N. E. 325.

In Ellison v. Sexton, *supra*, the court said: "It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner; but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice; that the party to be charged with it actually had it, or might, by reasonable diligence, have learned of the dissolution of partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally, the reasonableness of the notice will be a mixed question of law and fact to be submitted to the jury, under proper instructions of the court, as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution."

There is no fixed rule as to the number of papers in which notice must be published, or as to the character of the paper, or the number of times the notice must appear, or as to the size of type or degree of conspicuousness. The paper must be one published in the vicinity: Richards v. Butler (1880), 65 Ga. 593. Where the manufacturing operations of the firm were carried on at Baton

notice was consciously adopted, there may still be other facts or circumstances which sufficiently show that the partnership has come to an end.

Rouge, but the firm maintained an office at New Orleans where its chief financial operations were conducted, a notice published in a Baton Rouge paper only was held not enough: Grinnan v. Baton Rouge Mills Co. (1852), 7 La. Ann. 638, Mechem's Cas. 968. Where the firm carried on a small retail business in northern Michigan, it was held not necessary to publish notice in Chicago, where goods were subsequently bought of a wholesale dealer by a former partner: Solomon v. Kirkwood (1884), 55 Mich. 256, 21 N. W. 336, Mechem's Cas. 455, Burd. Cas. 554, Gilm. Cas. 589.

The notice must appear to be authoritative, but it is held that it need not be signed, and may appear in the "local" column: Solomon v. Kirkwood, *supra*. Compare Citizens Nat. Bank v. Weston, *supra*, which is more or less opposed.

The paper must be one of general circulation, and the notice should be published a reasonable number of times: Ellison v. Sexton (1890), 105 N. C. 356, 11 S. E. 180, 18 Am. St. Rep. 907 (one insertion in a daily paper *held* insufficient).

If the partner relies on notice left for publication in a weekly paper, *held*, that he runs the risk of dealings before the paper can appear: Martin v. Searles (1859), 28 Conn. 43, Mechem's Cas. 985.

Other means of notice than publication may be resorted to, their sufficiency being usually a question for the jury. See Lovejoy v. Spafford (1876), 93 U. S. 430, 23 L. ed. 581, Mechem's Cas. 977, where evidence of various facts was held admissible.

A change in name may be sufficient, but it must be such as to reasonably indicate the withdrawal of the defendant: American Linen Thread Co. v. Wortendyke (1862), 24 N. Y. 550; Coggswell v. Davis (1886), 65 Wis. 191, 26 N. W. 557; Gibbs v. Humphrey (1895), 91 Wis. 111, 64 N. W. Rep. 750. Compare also Bush v. McCarty (1906), 127 Ga. 308, 56 S. E. 430, 9 Ann. Cas. 240; Thayer v. Goss (1895), 91 Wis. 90, 64 N. W. 312, Mechem's Cas. 492.

The mere fact of the formation of a new partnership or the organization of a corporation is not of itself notice of the dissolution of a precedent partnership. There must be such change of name or other circumstances as to reasonably show that it was that particular business which was reorganized. See Goddard v. Pratt (1835), 33 Mass. (16 Pick.) 412; Howe v. Thayer (1835), 34 Mass. (17 Pick.) 91; Weise v. Gray's Harbor Com. Corp. (1904), 111 Ill. App. 647; Seufert v. Gille (1910), 230 Mo. 453, 131 S. W. 102, 31 L. R. A. (N. S.) 471; Southwick v. Allen (1839), 11 Vt. 75; Arnold v. Hart (1898), 176 Ill. 442, 52 N. E. 936; Overlock v. Hazzard (1909), 12 Ariz. 142, 100 Pac. 447; Byrum v. Clark (1899), 125 N. Car. 352, 34 S. E. 438.

Change in business conditions may be sufficient, such as closing the store, ceasing business, moving away, and the like, though the suffi-

The Uniform Partnership Act protects one who had known of the partnership prior to its dissolution where he had "no knowledge or notice"[19] of the dissolution, and "the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on."[20]

§ 395. Same subject—Knowledge—Constructive notice.—As is pointed out in the preceding section, it is not always necessary that any notice should expressly be given. The party concerned may already know it from other sources, or he may have knowledge of such other facts so related to the case that formal notice of the dissolution may be deemed unnecessary. This latter is sometimes termed a case of "constructive notice." The draftsmen of the Uniform Partnership Act criticise this last expression, and suggest a sharp distinction between *knowledge* and *notice*. Unfortunately their definition of "knowledge" is awkward, though their meaning can be gleaned. They say "A person has 'knowledge' of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith."[21] On the other hand, "A person has 'notice' of a fact within the meaning of this act when the person who claims the benefit of the notice (a) states the fact to such person, or (b) delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence."

As stated in the note to the preceding section there may be

ciency of these facts must ordinarily be left to the jury: Dickinson v. Dickinson (1874), 25 Gratt. (Va.) 321, Mechem's Cas. 477. "Reputation or notoriety in the community is not itself notice. But it may be considered by the jury, with the other evidence, in determining whether an inference of notice to the person sought to be charged with it should be drawn"; Bush v. McCarty, *supra*. See, also, Werner v. Calhoun (1904), 55 W. Va. 246, 46 S. E. 1024. Notice to Dun's and Bradstreet's commercial agencies, plaintiff not being a subscriber to either, is not of itself enough. Citizens Nat. Bank v. Weston, *supra*. Bank v. Weston, *supra*.

19 These terms are defined by the Act.

20 Sec. 35 (1) (b) (II).

21 Sec. 3.

many situations in which the kind of "knowledge" here referred to may be present, and dispense with the necessity of giving the "notice" otherwise requisite.

§ 396. Who should give notice—Actual and ostensible partners.—Notice of the dissolution may be given by either partner, and where the partnership is dissolved by mutual consent all of the partners usually unite in giving it. Each partner who withdraws from a firm is interested in giving notice, for, as will be seen,[22] where notice is required, a partner who retires, whether by sale of his interest or any other similar means, will, until notice is duly given, continue liable as a partner for future debts to those otherwise entitled to rely upon him as a partner.

If the partner desiring to give notice is prevented by his copartners from exercising that right, they may be compelled to do what may be necessary to enable notice to be given, as to sign advertisements or join in notices to former customers.[23]

The persons most obviously interested in giving notice are, of course, the actual and ostensible partners; but a merely nominal partner also, if he wishes to withdraw the appearance of partnership, will be interested in taking such steps as will accomplish that purpose.

§ 397. ——Dormant and secret partners.—A dormant partner, *i. e.*, one both secret and passive,[24] is, it is said, not bound to give notice of his withdrawal, for no one of the public knew of his connection with the firm, and no one, therefore, could have relied upon it;[25] but a mere secret partner is bound to

22 See *post*, § 398.

23 1 Lindley on Partnership (Ewell's ed.), 214; Troughton v. Hunter (1854), 18 Beav. 470; Hendry v. Turner (1886), 32 Ch. Div. 355.

24 For definitions of who is a dormant partner, see Elmira Rolling-Mill Co. v. Harris (1891), 124 N. Y. 280, 26 N. E. 541, Mechem's Cas. 987, Burd. Cas. 398, Gilm. Cas. 349; Rowland v. Estes (1899), 190 Pa. 111, 42 Atl. 528.

25 See Elmira Rolling Mill Co. v. Harris, *supra;* Elkinton v. Booth (1887), 143 Mass. 479, 10 N. E. 460; Austin v. Appling (1891), 88 Ga. 54, 13 S. E. 955; Nussbaumer v. Becker (1877), 87 Ill. 281, 29 Am. Rep. 53; Lieb v. Craddock (1888), 87 Ky. 525, 9 S. W. 838; Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. 695, 34 Am. St. R. 110, Mechem's Cas. 383; Brown v. Foster (1894), 41 S. C. 118, 19 S. E.

give notice of his withdrawal to those who knew of his connection with the firm, though not to those who had no knowledge of it.[26] A retiring dormant partner would also be liable to one

299; Milmo Nat. Bank v. Bergstrom (1892), 1 Tex. Civ. App. 151, 20 S. W. 836, Mechem's Cas. 481.

Burden of proof that a partner was a dormant one is on him who seeks to escape on that ground. Rowland v. Estes (1899), 190 Pa. 111, 42 Atl. 528.

The mere fact that it is agreed among the partners that the relationship of one of them shall not be mentioned, does not make him a dormant partner; Elmira Rolling Mill Co. v. Harris, *supra.*

The mere fact that a creditor does not know who the partners are, does not make them, as to him, dormant partners. He may well have relied upon their credit, although he had never ascertained their names; Elkinton v. Booth, *supra;* Deford v. Reynolds (1860), 36 Pa. 325.

The mere fact that a partner's name does not appear in the firm name does not make him a dormant partner. When a partnership is formed and an artificial name is adopted, *e. g.,* "Titusville Savings Bank," it must, it is said, "be regarded as an invitation to give credit not to the empty name but to the individuals who compose the association thus designated, and hence none of the partners can properly claim to be dormant partners." Clark v. Fletcher (1880), 96 Pa. 416; Shamburg v. Ruggles (1876), 83 Pa. 148; Elkinton v. Booth, *supra.* But see Hornaday v. Cowgill (1913), 54 Ind. App. 631, 101 N. E. 1030; Carter v. Whalley (1830), 1 B. & Ad. 11, *contra.*

Where A and B as partners do business under the name of A & Co., B is not thereby a dormant partner; Edward v. McFall (1850), 5 La. Ann. 167; Deering v. Flanders (1870), 49 N. H. 225; Podrasnik v. Martin (1887), 25 Ill. App. 300; Elmira Rolling Mill Co. v. Harris, *supra;* Deford v. Reynolds, *supra.* But see Heath v. Sansom (1832), 4 B. & Ad. 172; Warren v. Ball (1865), 37 Ill. 76; Kennedy v. Bohannon (1850), 50 Ky. (11 B. Mon.) 118; Grosvenor v. Lloyd (1840), 42 Mass. (1 Metc.) 19, *contra.* Compare Benjamin v. Covert (1879), 47 Wis. 375, 2 N. W. 625.

But where A and B do business under the name of A alone, B may be a dormant partner. See Pitkin v. Benfer (1892), 50 Kan. 108, 31 Pac. 695, 34 Am. St. R. 110, Mechem's Cas. 383; Milmo Nat. Bank v. Bergstrom (1892), 1 Tex. Civ. App. 151, 20 S. W. 836, Mechem's Cas. 481; Nussbaumer v. Becker (1877), 87 Ill. 281, 29 Am. Rep. 53; Kelley v. Hurlbut (1826), 5 Cow. (N. Y.) 534; Brown v. Foster (1896), 41 S. Car. 118, 19 S. E. 299.

So where A, B and C do business in the name of A and B alone, C may be a dormant partner. See Gorman v. Davis (1896), 118 N. Car. 370, 24 S. E. 770.

26 See Lieb v. Craddock, *supra;* Milmo Nat. Bank v. Bergstrom, *supra;* Edwards v. McFall, *supra.*

who knew of his existence, and who was not given notice of his withdrawal.[27]

This exemption of the dormant partner from the necessity of giving notice, however, is not always to be relied upon. The supposedly dormant partner may find that he has in fact been discovered or disclosed, perhaps by his own partner and in violation of their agreement; and, while he would doubtless in such a case have a remedy against his partner, he would also be liable to the creditor.[28] There is, moreover, much difference of view as to who is to be deemed a dormant partner within the rule, though the weight of authority in this country supports the rule as stated in the first paragraph of this section. The Uniform Partnership Act seems to take the same view, though the language is somewhat obscure.[29]

§ 398. Effect of not giving notice.—Where a partnership is dissolved or a known member of the firm retires, under circumstances requiring notice, then, until the dissolution or retirement has been duly notified, the power of each partner to continue to bind the others by contracts within the scope of the business, made with third persons entitled to notice, remains unimpaired, although as between the partners themselves his authority may be at an end.[30]

27 See cases in preceding note. In Benjamin v. Covert (1879), 47 Wis. 375, 2 N. W. 625, it was held that where one who would normally be regarded as a dormant partner becomes generally known as a partner, and, after his withdrawal without notice, the reputation so formed that he is a partner still continues, a new customer who gives credit after such withdrawal but in reliance upon that continuing reputation may hold the retiring partner liable.

28 See Milmo Nat. Bank v. Bergstrom, *supra;* Elmira Rolling Mill Co. v. Harris, *supra.*

29 Sec. 35. (2) "The liability of a partner under paragraph (1 *b*) shall be satisfied out of partnership assets alone when such partner has been prior to dissolution—

(*a*) Unknown as a partner to the persons with whom the contract is made, and

(*b*) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it." (Suppose, *e. g.*, that an unknown and inactive partner keeps the firm in good standing by timely and judicious advances or loans, is he a "dormant" partner within this clause?)

30 See Morrill v. Bissell (1894), 99 Mich. 409, and note; Prentiss v.

The retiring partner, in the absence of notice, remains liable also, it has been said, for the torts committed subsequently by his late partners or their agents in the line of their former business;[31] but this can be true only of those torts which result from reliance upon the apparent continuance of the partnership.[32]

The partner who has given proper notice may, of course, nullify its effect as to particular persons by words or conduct reasonably inducing in them the belief that, notwithstanding the notice, he still continues as a partner.[33]

Sinclair (1831), 5 Vt. 149, 26 Am. Dec. 288, and note; Austin v. Holland (1877), 69 N. Y. 571, 25 Am. Rep. 246, Mechem's Cas. 464, Gilm. Cas. 343; Benjamin v. Covert (1879), 47 Wis. 375, 2 N. W. 625.

31 See 1 Lindley on Partnership (Ewell's ed.), 214, citing Stables v. Eley (1825), 1 Car. & P. 614—a case wherein the plaintiff was injured by the negligent driving of a cart which still bore the old firm name. But see Pollock's Digest of Partnership (6th ed.), 54, where this error was pointed out. See also Smith v. Bailey (1891), 2 Q. B. 403; Shapard v. Hynes (1900), 45 C. C. A. 271, 104 Fed. Rep. 449, 52 L. R. A. 675; Austin v. Appling (1891), 88 Ga. 54, 13 S. E. 955. The mistake is corrected in later editions of Lindley on Partnership, *e. g.*, the 7th at p. 79.

32 See Jewison v. Dieudonne (1914), 127 Minn. 163, 149 N. W. 20. Compare Sherrod v. Langdon (1866), 21 Iowa 518; Maxwell v. Gibbs (1871), 32 Iowa 32.

33 See *ante* § 106; *In re* Kreuger (1871), 2 Low. 66, Mechem's Cas. 183, (continuing name in firm name); Brown v. Leonard (1816), 2 Chitty 120, Ames' Cas. 141, (defendant told plaintiff he had retired but that his name was to continue to be used for a time).

Compare *In re* Fraser (1892), 2 Q. B. 633, Mechem's Cas. 781, Burd. Cas. 108.

CHAPTER XVII.

OF THE EFFECT OF DISSOLUTION UPON THE RIGHTS AND AUTHORITY OF PARTNERS.

§ 399. In general.—The partnership being dissolved for some sufficient reason, and due notice having been given when nec-

essary, it remains to be considered what is the effect of the dissolution, particularly as respects the powers and duties of the partners. For reasons which will be obvious, dissolution by death, which completely removes one of the partners, presents an aspect entirely different from that presented when dissolution results from any other cause, leaving all partners alive and capable or desirous of acting. The effect of death, therefore, must be separately considered.

1. *Dissolution by Death.*

§ 400. Effect on rights and liabilities of the firm.—Existing and vested rights of the partners are, of course, not destroyed by the death, though the *legal* ownership of them may be altered.[1] Existing liabilities are not discharged, though the method of enforcing them may be changed.[2] The firm not being an entity, continuing contracts of a personal sort are not necessarily discharged by the death of a partner as though the *firm* were dead,[3] but as the continuance of the partnership may be an express or implied condition, its termination in fact by death may operate to terminate such a contract. The decisions in the case of contracts of employment by the firm are not in harmony.[4]

§ 401. Effect on authority of firm as agent of third persons.—Where the firm, *i. e.*, the partners jointly and collectively, has been appointed agent of a third person, the dissolution of the partnership by the death of one of the partners will ordinarily terminate that agency.[5]

1 See *post*, § 402.

2 See *post*, § 411.

3 See Hughes v. Gross (1896), 166 Mass. 61, 43 N. E. 1031, 55 Am. St. R. 375, 32 L. R. A. 620, Burd. Cas. 296.

4 That the contract is not terminated, see Fereira v. Sayres (1843), 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496. Not where the firm in fact continues; Hughes v. Gross, *supra*. That it is terminated: Tasker v. Shepherd (1861), 6 Hurl. & N. 575; Burnet v. Hope (1885), 9 Ont. Rep. 10; Greggs v. Swift (1889), 82 Ga. 392, 9 S. E. 1062, 14 Am. St. R. 176, 5 L. R. A. 405; Greenburg v. Early (1893), 30 Abb. N. Cas. (N. Y.) 300.

5 See Mechem on Agency (2nd ed.) § 673; Larson v. Newman (1909), 19 N. Dak. 153, 121 N. W. 202, 23 L. R. A. (N. S.) 849.

§ 402. Rights, powers and liabilities of the surviving partner.—The death of one partner ordinarily operates, as has been seen, to dissolve the partnership. Such dissolution ordinarily operates instantly and *ipso facto* to terminate the authority of the survivors to *continue* the business or make *new* contracts, in the firm name.[6] It also devolves upon the survivors peculiar rights and duties. Upon dissolution by death the entire legal title to all the partnership personalty passes to the surviving partner or partners;[7] and although the title to real estate ordinarily descends to the heir of the deceased partner who held it, the survivors, as has been seen, have the power in equity to make it available for the purpose of liquidating the demands against the partnership.[8] They alone, to the exclusion of the representatives of the deceased partner, have the right to the possession of the partnership assets,[9] and to collect or receive

6 See Lang v. Waring (1850), 17 Ala. 145; Big Four Implement Co. v. Keyser (1916), 99 Kan. 8, 161 Pac. 592, L. R. A. 1917 C. 166; First Nat. Bank v. Cody (1893), 93 Ga. 127, 19 S. E. 831 (though where it is a renewal note the assets may still be liable for the original debt): Central Sav. Bank v. Mead (1873), 52 Mo. 546; Macon Exch. Bank v. Tracy (1883), 77 Mo. 594; Bank of Port Gibson v. Baugh (1848), 9 Sm. & M. (Miss.) 290; Durant v. Pierson (1891), 124 N. Y. 444, 26 N. E. 1095, 21 Am. St. R. 686, 12 L. R. A. 146, Mechem's Cas. 525; Castle v. Reynolds (1840), 10 Watts (Pa.) 51; Bauer Grocer Co. v. McKee Shoe Co. (1899), 87 Ill. App. 434.

Estate of deceased partner is not directly bound for debt so created; Bagel v. Miller (1903), 2 K. B. 212.

7 In Barry v. Briggs (1871), 22 Mich. 201, the rule is stated that a sole surviving partner has the entire legal title to all the partnership assets. He has the right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases, to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form. See also Andrews v. Brown (1852), 21 Ala. 437, 56 Am. Dec. 252, Gilm. Cas. 267.

8 See *ante*, § 169; Shanks v. Klein (1881), 104 U. S. 18, 26 L. ed. 635, Mechem's Cas. 211, Ames' Cas. 597, Gilm. Cas. 269.

9 As to personalty see Hawkins v. Capron (1892), 17 R. I. 679, 24 Atl. 466, Mechem's Cas. 499; Andrews v. Brown (1852), 21 Ala. 437, 56 Am. Dec. 252; Starr v. Case (1882), 59 Iowa 491, 13 N. W. 645 (the library of a firm of lawyers); Murray v. Mumford (1826), 6 Cow. (N. Y.) 441 (the firm account books); Hewitt v. Hayes (1910), 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154.

debts due the firm.[10] Causes of action, being joint, at law, survive to or against them, and therefore they alone are the ones to sue or be sued in respect to partnership dealings.[11] But while

As to realty, while the legal title does not go to the survivor, he would have the right of a tenant in possession wherever the title stood in the name of both or of himself only; an undoubted right to the possession of whatever was necessary to enable him to close up the business; and a right to make available for partnership purposes any legal titles held in trust for the partnership. See Dyer v. Clark (1843), 5 Metc. (Mass.) 562, 39 Am. Dec. 697, Ames' Cas. 251; French v. Vanatta (1907), 83 Ark. 306, 104 S. W. 141; Sternberg v. Larkin (1897), 58 Kan. 201, 48 Pac. 861, 37 L. R. A. 195; Clark v. Fleischmann (1908), 81 Neb. 445, 116 N. W. 290.

10 See Peters v. Davis (1811), 7 Mass. 257; Oakman v. Ins. Co. (1867), 98 Mass. 57; Belton v. Fisher (1867), 44 Ill. 32; Willson v. Nicholson (1878), 61 Ind. 241; Bassett v. Miller (1878), 39 Mich. 133.

11 Survivor sues in his own name, usually describing himself as "survivor of himself and (the other partner) deceased." Representatives of deceased partner not proper parties defendant to be joined with survivor in actions at law on partnership obligations. Childs v. Hyde (1859), 10 Iowa 294, 77 Am. Dec. 113; Voorhis v. Child's Exr. (1858), 17 N. Y. 354, Burd. Cas. 490, Gilm. Cas. 298. So, also, of equitable actions whose sole object is to enforce an accounting by the partnership. Rusling v. Brodhead (1896), 55 N. J. Eq. 200, 35 Atl. 841, Burd. Cas. 273.

Representatives of deceased partner not necessary or proper parties plaintiff in actions to enforce rights belonging to the partnership: the survivor alone is the person to sue. Sterns v. Houghton (1866), 38 Vt. 583, Gilm. Cas. 273. In equity: Haig v. Gray (1850), 3 DeG. & S. 741, Burd. Cas. 246. So, of causes of action arising after the death: Bassett v. Miller (1878), 39 Mich. 133, Gilm. Cas. 271 (action for price of goods sold by survivor); Pfeffer v. Steiner (1873), 27 Mich. 537, Gilm. Cas. 272 (trespass to firm property in possession of survivor). Survivor in suing may join an individual claim with one accruing to him as survivor: Adams v. Hackett (1853), 27 N. H. 289, 59 Am. Dec. 376, Gilm. Cas. 274; Hancock v. Haywood (1789), 3 T. R. 433.

In action by survivor on partnership claim, *held*, that defendant may set off claim against survivor personally: Holbrook v. Lackey (1847), 13 Metc. (Mass.) 132, 46 Am. Dec. 726, Mechem's Cas. 999; *contra*, Waln v. Hewes (1819), 5 Serg. & R. (Pa.) 468. A surviving partner, in a suit against him for a separate debt of his own, may set off a debt due to him and his deceased partner jointly: Slipper v. Stidstone (1794), 5 T. R. 493; Johnson v. Kaiser (1878), 40 N. J. L. 286; or in an action against him on a partnership debt, he may set off a debt due him personally: Lewis v. Culbertson (1824), 11 Serg. & R. (Pa.) 48, 14 Am. Dec. 607. The legal title to a judgment

they may have the legal title, they are commonly said to hold it in a species of trust.[12] It is their duty to collect and preserve the assets, to apply them to the payment of the debts, to close up the business with reasonable promptness,[13] and to account to the representatives of the deceased partner for his share of the final balance.[14] In their dealings with partnership assets, the surviving partners are charged with all the duties of fair

recovered by the survivor as such is in him personally: Nehrbross v. Bliss (1882), 88 N. Y. 600, 2 Civ. Proc. R. 39, Burd. Cas. 246. But survivor cannot sue where he and his copartner while living could not have maintained an action: Patton v. Carr (1895), 117 N. Car. 176, 23 S. E. 182, Burd. Cas. 248.

12 The trust relationship is much more strongly stated in the American cases than in the English cases. See, for example, the remarks of Lord Westbury in Knox v. Gye (1872), L. R. 5 Eng. Ir. App. 656, and compare the views of the Lord Chancellor in the same case.

For purposes of suit, the survivor is permitted to deal with the partnership claims very much as though he owned them. See Holbrook v. Lackey (1847), 13 Metc. (Mass.) 132, 46 Am. Dec. 726, Mechem's Cas. 999, and cases cited.

Massachusetts cases speak of him as the absolute owner, though subject to a liability to account for the proceeds and for their application to partnership debts, etc. Hewitt v. Hayes, *supra.*

Nevertheless, he is not the unqualified owner. For example, his interest in the partnership property which can be reached by his individual creditor in competition with firm creditors, is not increased. Maddock v. Skinker (1896), 93 Va. 479, 25 S. E. 535, Burd. Cas. 250. See also Richardson v. Redd (1896), 118 N. Car. 677, 24 S. E. 420, Burd. Cas. 260.

13 See Clay v. Field (1888), 34 Fed. 375; 115 U. S. 260; 118 U. S. 97; Gable v. Williams (1882), 59 Md. 46; Roach v. Brannon, *supra.*

He has large discretion as to methods, if acting in good faith. Is not obliged to apply assets *pro rata* on all debts, but may make preferences, if no statute forbids.

As to the duty of the survivor to preserve the good will for the benefit of the partners, and his liability if he appropriates it to himself, see Hutchinson v. Nay (1903), 183 Mass. 355, 67 N. E. 601, Mechem's Cas. 838, s. c., 187 Mass. 262, 72 N. E. 974, 105 Am. St. R. 390, 68 L. R. A. 186, Mechem's Cas. 842; Costa v. Costa (1915), 222 Mass. 280, 110 N. E. 309; Rowell v. Rowell (1904), 122 Wis. 1, 99 N. W. 473; Rammelsberg v. Mitchell (1875), 29 Ohio St. 22; Lobeck v. Lee, etc. Hardware Co. (1893), 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795; Joseph v. Herzig (1910), 198 N. Y. 456, 92 N. E. 103; Dyer v. Shove (1897), 20 R. I. 259, 38 Atl. 498, Burd. Cas. 605.

14 See Valentine v. Wysor (1890), 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, Mechem's Cas. 500, Gilm. Cas. 275.

dealing and regard for the interests of the firm which are required of trustees.[15]

§ 403. —— While engaged in closing up the business, the surviving partners may exercise such powers as are reasonably necessary to accomplish that purpose; and though no contract which they may make will directly bind the representatives or estate of the deceased partner, yet, if the liability was properly incurred, the survivors may reimburse themselves out of the partnership assets, and, in case of a deficiency, have a claim for contribution from the estate of the deceased partner.[16] Thus

15 A surviving partner so far occupies the position of trustee, that he cannot be permitted to make gain for himself at the expense of the estate of a deceased partner. Little v. Caldwell (1894), 101 Cal. 553, 36 Pac. 107, 40 Am. St. R. 89; Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. 937, 46 Am. St. R. 867, 28 L. R. A. 129, Burd. Cas. 257; Russell v. McCall (1894), 141 N. Y. 437, 36 N. E. 498, 38 Am. St. R. 807, Burd. Cas. 256; Dewey v. Chapin (1892), 156 Mass. 35, 30 N. E. 223, Burd. Cas. 255; Joseph v. Herzig, *supra*. He cannot buy of or sell to himself without the consent of the representatives of the deceased partner. Denholm v. McKay (1889), 148 Mass. 434, 19 N. E. 551, 12 Am. St. R. 574. But he is not incompetent to buy from the representatives of the estate of the deceased partner. Valentine v. Wysor, *supra*. See, also, Clark v. Fleischmann, *supra;* Sternburg v. Larkin (1897), 58 Kan. 201, 48 Pac. 861, 37 L. R. A. 195. Must give full information if he deals with the representatives. Welbourn v. Kleinle (1900), 92 Md. 114, 48 Atl. 81; Tennant v. Dunlap (1899), 97 Va. 234, 33 S. E. 620. If he misappropriates the assets, equity will give relief. Russell v. McCall (1894), 141 N. Y. 437, 36 N. E. 498, 38 Am. St. R. 807. He is bound to keep accurate accounts and to keep the representatives of the deceased partner informed of all that properly concerns them. Heath v. Waters (1879), 40 Mich. 457.

16 The contracts made by the surviving partner bind himself only, if any one, though he may by stipulation limit liability to goods pledged. If he properly incurs such a liability, he may pay it out of the assets, or pledge assets for its payment, (see Durant v. Pierson in next note). He may be sued personally upon such liabilities. In case of deficiency in the partnership assets to reimburse him, he may have contribution from the estate of the deceased partner. He can ordinarily not make such claim until he has completed the administration of the partnership affairs. See generally Blakely v. Smock (1897), 96 Wis. 611, 71 N. W. 1052; Logan v. Dixon (1889), 73 Wis. 533, 41 N. W. 713; Gleason v. White (1867), 34 Cal. 258; Hanna v. Wray (1874), 77 Pa. 27. For the amount of his claim after settle-

they may sell, mortgage or pledge the property, borrow money,[17]

ment and exhausting of partnership assets, he may prove as an individual creditor against estate of deceased partner, *pari passu* with other individual creditors, it is held in Olleman v. Reagan (1867), 28 Ind. 109. [Compare *In re* Ruby (1897), 24 Ont. App. 509]. Subject to their priority, says Uniform Partnership Act, Sec. 40 (*i*).

Undoubtedly, it might have been held in these cases that the surviving partner had an authority coupled with an interest which would have made it irrevocable by the partner's death. (See Blodgett v. American Nat. Bank (1881), 49 Conn. 9; Laughlin v. Lorenz (1864), 48 Pa. 275, 86 Am. Dec. 592). But that is not the way in which the matter has been developed.

Persons dealing with the surviving partner are, of course, ordinarily charged with notice of his situation and restricted authority.

The partnership creditor who obtains judgment against the survivor may levy upon the partnership property and the property of the surviving partner, but not upon the separate property of the deceased partner. His remedy as to the latter is in equity, as will be seen *post*, § 411. As to levies upon the partnership property, by attachment or execution, see Roach v. Brannon (1879), 57 Miss. 490; Krueger v. Speith (1889), 8 Mont. 482, 20 Pac. 664, 3 L. R. A. 291; Stampfle v. Bush (1913), 71 W. Va. 659, 77 S. E. 283.

17 Thus in Durant v. Pierson (1891), 124 N. Y. 444, 26 N. E. 1095, 21 Am. St. R. 686, 12 L. R. A. 146, Mechem's Cas. 525, the court say: "When a partnership is dissolved by the death of a partner, the survivor is entitled to the possession and control of the joint property for the purpose of closing its business, and to that end and for that purpose he may, according to the settled principles of the law of partnership, administer the affairs of the firm, and by sale, mortgage, or other reasonable disposition of the property, make provision for meeting its obligations. He may, for that purpose, borrow money, and give a valid pledge of the copartnership property for its repayment. Williams v. Whedon, 109 N. Y. 333, 4 Am. St. R. 460; Emerson v. Senter, 118 U. S. 3, 8; Fitzpatrick v. Flannagan, 106 U. S. 648; Butchart v. Dresser, 4 DeGex, M. & G. 542, 10 Hare 453; *In re* Clough, Bradford Commercial Banking Co. v. Cure, L. R. 31 Ch. Div. 326." See, also, Barton v. Lovejoy (1894), 56 Minn. 380, 57 N. W. 935, 46 Am. St. R. 482; Peoples Bank v. Wilcox (1904), 136 Mich. 567, 100 N. W. 24; Kenney v. Howard (1896), 68 Vt. 194, 34 Atl. 700, Burd. Cas. 271; *In re* Bourne [1906], 2 Ch. 427, 3 Br. Rul. Cas. 569 and note.

Survivor may assign choses in actions belonging to the partnership, as well as dispose of the tangible property. See Lindner v. Adams County Bank (1896), 49 Neb. 735, 68 N. W. 1028, Mechem's Cas. 523, Burd. Cas. 262.

Notice of dishonor to charge the partnership may be given to the survivor. Slocomb v. DeLizardi

and repay it out of the assets, or make an assignment for the benefit of creditors.[18] They ordinarily may and should complete the executory contracts into which the firm had entered,[19] and for this purpose have the authority, in the manner above stated, to purchase materials, employ assistance or make such other incidental contracts as the case reasonably requires.[20]

(1869), 21 La. Ann. 355, 99 Am. Dec. 740.

18 Although there has been a little doubt about the right of the survivor to make an assignment for the benefit of creditors, the weight of authority undoubtedly sustains it: Fitzpatrick v. Flannagan (1882), 106 U. S. 654, 27 L. ed. 211; Emerson v. Senter (1885), 118 U. S. 3, 30 L. ed. 49, Burd. Cas. 253; Williams v. Whedon (1888), 109 N. Y. 333, 16 N. E. 365, 4 Am. St. R. 460; Patton v. Leftwich (1889), 86 Va. 421, 10 S. E. 686, 19 Am. St. R. 902, 6 L. R. A. 569; Breen v. Richardson (1883), 6 Colo. 605, Gilm. Cas. 410; in the absence of a statute expressly or by implication forbidding: Shattuck v. Chandler (1889), 40 Kan. 516, 20 Pac. 225, 10 Am. St. R. 227, Mechem's Cas. 363; State v. Withrow (1897), 141 Mo. 69, 41 S. W. 980.

See also Hewitt v. Hayes (1910), 204 Mass. 586, 90 N. E. 985, 27 L. R. A. (N. S.) 154.

Cannot give preferences in Colorado; Salisbury v. Ellison (1883), 7 Colo. 167, 2 Pac. 906, 49 Am. Rep. 347.

19 The liability of all the partners, including the estate of the deceased partner, for existing obligations is, of course, in the ordinary case, not terminated by the death, (see Davis v. Sowell (1884), 77 Ala. 262; Mason v. Tiffany (1867), 45 Ill. 392; McGill v. McGill (1859), 59 Ky. (2 Metc.) 258; Winter v. Inness (1838), 4 Myl. & C. 101; Devaynes v. Noble (1831), 2 Russ. & M. 495); though, as will be seen (*post*, § 411) the *method* of enforcing it is altered.

Contracts, however, depending upon the continued existence of a particular person would usually be terminated by his death. See Hughes v. Gross (1896), 166 Mass. 61, 32 L. R. A. 620, 43 N. E. 1031; Burd. Cas. 296, 55 Am. St. R. 375; Tasker v. Shepherd (1861), 6 H. & N. 575; Schlau v. Enzenbacker (1914), 265 Ill. 626, 107 N. E. 107, L. R. A. 1915 C 576; Clifton v. Clark (1904), 83 Miss. 446, 36 So. 251, 102 Am. St. R. 458, 66 L. R. A. 821, Mechem's Cas. 1010.

Contracts between two firms having some members in common, one of whom has died (thereby dissolving both firms), are held not to be within this rule for completing performance. Oliver v. Forrester (1880), 96 Ill. 315, Mechem's Cas. 1004.

There may be contracts, *e. g.*, wholly executory contracts for work involving long time, much expense and great risk wherein it would doubtless be rather the part of prudence to endeavor to procure a cancellation on fair terms.

20 See Little v. Caldwell (1894), 101 Cal. 553, 36 Pac. 107, 40 Am.

Upon the death of the sole surviving partner before the estate is closed, his powers and liabilities pass to his administrator or executor.[21] The right of the survivor to compensation has already been referred to in a previous section.[22]

The fact that the surviving partner was a dormant one, or even that he is insolvent, is held not to affect his right to wind up the partnership affairs, as above stated; but under the Uniform Partnership Act the survivor may not act if he has become bankrupt.[23]

The Uniform Partnership Act provides that "on the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose."[24]

§ 404. Where there are several survivors.—Where there are two or more survivors their respective rights, powers and duties in the field of closing up the business are, as were their rights, powers and duties in the field of carrying it on before the dissolution, ordinarily equal.[25] Either one, for example, may re-

St. R. 89; Calvert v. Miller (1886), 94 N. C. 600, Mechem's Cas. 1002; Oliver v. Forrester (1880), 96 Ill. 315, Mechem's Cas. 1004; Andrews v. Stinson (1912), 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B 928; Remick v. Emig (1866), 42 Ill. 342; Rust v. Chisholm (1881), 57 Md. 376; Condon v. Callahan (1905), 115 Tenn. 285, 89 S. W. 400, 112 Am. St. R. 833, 1 L. R. A. (N. S.) 643, 5 Ann. Cas. 659; O'Connell v. Schwanabeck (1889), 76 Mich. 517, 43 N. W. 599; Miller v. Hoffman (1887), 26 Mo. App. 199. Small purchases, incident to closing up, or calculated to promote the sale of the residue of the assets, may be justified under this rule, while general purchases to enable the business to be continued would not be. Oliver v. Forrester, *supra;* Andrews v. Stinson, *supra;* Big Four Implement Co. v. Keyser (1916), 99 Kan. 8, 161 Pac. 592, L. R. A. 1917 C 166.

21 Galbraith v. Tracy (1894), 153 Ill. 54, 38 N. E. 937, 46 Am. St. R. 867, 28 L. R. A. 129, Burd. Cas. 257; Dayton v. Bartlett (1882), 38 Ohio St. 357; Brooks v. Brooks (1873), 12 Heisk. (Tenn.) 12.

22 See *ante,* § 178.

23 Sec. 35 (3) (b); Sec. 37.

24 Sec. 25 (d).

25 See Davis v. Sowell (1884), 77 Ala. 262.

ceive payment of a debt due to the partnership, or make payment of a debt due from it.[26] They would have equal rights to the possession, and equal duties as to the disposition, of the assets.[27] Neither one could bind the other personally by a *new* contract made in the firm name or otherwise, without the latter's consent;[28] but if it were an expense properly incurred in closing up the business, it could be paid out of the assets, and, in case of a deficiency, the other survivor would be liable for contribution of his *pro rata* share, as would also the estate of the deceased partner.

They may, as between themselves, and often do, arrange that one of them shall act instead of all of them in closing up the affairs, but this would not of itself enlarge the authority of that one.[29]

§ 405. Statutory changes in some States.—In a number of states, for example, Kansas, Maine, Missouri, New Mexico and Washington, statutes have made a more or less radical change in the situation of the surviving partner. These statutes commonly provide that the partnership estate shall be administered by the representative of the deceased partner unless the survivor, within a time limited, applies for administration and gives a bond provided for by the statutes.[30]

§ 406. Uniform Partnership Act.—The Uniform Partnership Act makes no specific provision respecting administration by

[26] See Davis v. Sowell, *supra.*

[27] See Davis v. Sowell, *supra.*

[28] See Marlett v. Jackman (1861), 85 Mass. (3 Allen) 287, Ames' Cas. 551, Burd. Cas. 547; Jenness v. First Nat. Bank (1879), 40 Mich. 347; Matteson v. Nathanson (1878), 38 Mich. 377; Bass Dry Goods Co. v. Granite City Mfg. Co. (1902), 116 Ga. 176, 42 S. E. 415.

[29] See Bass Dry Goods Co. v. Granite City Mfg. Co. *supra.* (Here one survivor alone acted in closing up, and the other served as his agent. *Held,* that the one who acted was liable to a third person for a contract made by his direction through the one serving as his agent).

[30] See Shattuck v. Chandler (1889), 40 Kan. 516, 20 Pac. 225, 10 Am. St. R. 227, Mechem's Cas. 363; Bass v. Emery (1883), 74 Me. 338; Shaw, *et al.* Appellants (1889), 81 Me. 207, 16 Atl. 662; Easton v. Courtright (1884), 84 Mo. 27; Dow v. Simpson (1912), 17 N. Mex. 357, 132 Pac. 568; State v. Neal (1902), 29 Wash. 391, 69 Pac. 1103. A somewhat similar statute exists in Illinois; also one in Louisiana.

the surviving partner. Section 37 provides that "unless otherwise agreed, the partners who have not wrongfully dissolved the partnership [and this would include the surviving partner or partners] or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court." The partnership is "dissolved" though not "terminated" by the death of any partner;[31] "except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership" in the situations enumerated;[32] "after dissolution a partner can bind the partnership (except as provided in paragraph 3), (a) by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution, (b) by any transaction which would bind the partnership if dissolution had not taken place" provided notice had not been given when and as required.[33] Nevertheless, it is believed that in binding "the partnership," after the death of one partner, under this provision the estate of the deceased partner or his legal representative is not included. On the other hand, where there are several survivors it would seem that each was the agent for all and could bind them personally in winding up the partnership affairs or completing transactions unfinished at the time of the dissolution.

"The dissolution of the partnership does not of itself discharge the existing liability of any partner."[34] "The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts."[35]

§ 407. Continuing business under provisions of will.—The authority of the surviving partners is to close up and not to continue the partnership affairs, and they have therefore no

[31] Sec. 30.

[32] Sec. 33.

[33] Sec. 35.

[34] Sec. 36 (1).

[35] Sec. 36 (4).

right to make new contracts, engage in fresh enterprises or carry on the partnership business for any longer period than is reasonably necessary to enable the affairs to be closed up without unnecessary loss or injury. If, in violation of their duty, they do continue the business, they may be restrained by injunction, or they may be held accountable for interest or profits and will be charged personally with the losses.[36]

The deceased partner may, however, by his will authorize the business to be carried on for a period limited therein, either by the survivors alone or by the survivors and his executors jointly, and the business may be continued in pursuance of such a provision.[37] In such a case, unless there is something

[36] See Story on Partnership, § 343; Robinson v. Simmons (1888), 146 Mass. 167, 15 N. E. 558, 4 Am. St. R. 299.

[37] Such provisions are usually permissive only, and not obligatory. The executor, for example, is not *obliged* to become a partner and assume that risk. See Andrews v. Stinson (1912), 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913 B 928. If he does do so, he is usually personally liable for the debts subsequently contracted, with a right to indemnity out of the partnership assets. These may prove insufficient: See Laible v. Ferry (1880), 32 N. J. Eq. 791; Wild v. Davenport (1886), 48 N. J. L. 129, 7 Atl. 295, 57 Am. Rep. 552, Burd. Cas. 77; Austin v. Munro (1872), 47 N. Y. 360; Clopton v. Gholson (1876), 53 Miss. 466; Wade v. Pope (1870), 44 Ala. 690; "The Liabilities of a Partner's Executor" (1906), 54 American Law Register 565.

So, also, where the survivor is authorized to continue: He is not *obliged* to do so unless he has agreed to do it. If he does continue, he usually makes himself personally liable for the subsequent debts, with a right to reimbursement out of the partnership assets. See cases cited in next section. Wherever it is optional so to act or not the executor or survivor could refuse to act unless and until those who might be interested in his acting, *e. g.*, the heirs of the deceased partner, should make special terms for his protection.

It is said that provisions for continuance of the business by the executor must specifically authorize it in order to justify it. Exchange Bank v. Tracy (1883), 77 Mo. 594. See, also, *Ex parte* Manchester Bank (1879), 12 Ch. D. 917, Burd. Cas. 263; Altgelt v. Sullivan (1903), — Tex. Civ. App. —, 79 S. W. 333.

If the executor does not become a partner, he will not, merely by tacitly permitting the firm assets to remain with the survivor as directed, or by receiving part of the profits of the business, become liable for the debts of the continued business. See Wild v. Davenport, *supra;* Walker v. Walker (1889), 88 Ky. 615, 11 S. W. 718; Owens v. Mackall (1870), 33 Md. 382; Tisch v. Rockafellow

in the will to indicate a contrary purpose, it will be presumed that the deceased intended to subject to the hazard of the business only the capital already embarked in it, and not the general residue of his estate;[38] but under clear and appropriate provisions the entire estate may be involved.[39]

§ 408. Continuing in pursuance of partnership articles.— Provisions for continuing the business by the survivor are frequently found in the partnership articles. They may be permissive only or contractually obligatory. They may also define the term and conditions. If they do not, permissive provisions, at least, are usually held to apply only to the assets of the deceased already embarked in the business and not to the general residue of his estate.[40] Contractually obligatory provisions are, of course,

(1904), 209 Pa. 419, 58 Atl. 805; Avery v. Myers (1882), 60 Miss. 367.

If he actually participates as a partner he will be personally liable for the debts. Citizens Mut. Ins. Co. v. Ligon (1881), 59 Miss. 305; Alsop v. Mather (1831), 8 Conn. 584, 21 Am. Dec. 703. So if the business is continued by agreement with him, City Nat. Bank v. Stone (1902), 131 Mich. 588, 92 N. W. 99; but even in such cases he would not be personally liable for debts contracted in the deceased partner's lifetime: Mattison v. Farnham (1890), 44 Minn. 95, 46 N. W. 347. When he thus participates by direction of the will, he may be reimbursed out of the assets properly devoted to the business. Wild v. Davenport, *supra.*

38 See Smith v. Ayer (1879), 101 U. S. 320, 25 L. ed. 955; Jones v. Walker (1880), 103 U. S. 444, 26 L. ed. 404, Mechem's Cas. 509; Burwell v. Mandeville (1844), 2 How. (43 U. S.) 560, 11 L. ed. 378; Pitkin v. Pitkin (1829), 7 Conn. 307, 18 Am. Dec. 111; Brasfield v. French (1882), 59 Miss. 632; Furst v. Armstrong (1902), 202 Pa. 348, 51 Atl. 996, 90 Am. St. R. 653; Davis v. Christian (1859), 15 Gratt. (Va.) 11; *Ex parte* Garland (1803), 10 Ves. 110; *Ex parte* Richardson (1818), 3 Madd. 138.

As to the application of payments made where the business is continued after the dissolution, see Wiesenfeld v. Byrd (1881), 17 S. Car. 106; Tootle v. Jenkins (1891), 82 Tex. 29, 17 S. W. 519; Stanwood v. Owen (1859), 80 Mass. (14 Gray) 195.

39 See Ferris v. Van Ingen (1899), 110 Ga. 102, 34 S. E. 347.

40 See Willis v. Sharp (1889), 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; Stewart v. Robinson (1889), 115 N. Y. 328, 22 N. E. 160, 35 L. R. A. 410; Vincent v. Martin (1885), 79 Ala. 540. Compare Shaw, *et al,* Appellants (1889), 81 Me. 207, 16 Atl. 662. Such provisions must be clear and unequivocal in order to justify continuance: Alexander v. Lewis (1877), 47 Tex. 481.

In Stanwood v. Owen (1859), 80

to be construed according to their terms, but, in a number of cases, they have been held to involve the entire estate.[41]

Provisions of the latter sort could not ordinarily be executed if there were existing general creditors of the deceased who insisted upon immediately subjecting the residue of the estate to the payment of their claims.[42]

§ 409. Continuing in pursuance of personal agreements.—Where there is no provision either in the will of the deceased partner or in the partnership articles, the persons who are entitled to the deceased partner's share may consent to a continuance of the business on such terms as they may deem advisable; and such consent of competent parties will, at least, estop them from complaining of any proceeding covered by it,[43] and by their contract they may bind themselves to contribute to the payment of debts and expenses on such terms as they see fit to make.

Such an obligation may undoubtedly arise by implication, as where, without express arrangements, there is yet a tacit acquiescence in the fact.

§ 410. Provisions that survivor shall acquire interest of deceased.—Partnership articles not infrequently provide that, in case of the death of a partner, his interest shall or may be purchased by the survivor upon terms or in a manner stated. Such provisions are entirely lawful, and often highly desirable. Where they possess the requisite characteristics of certainty and consideration, such agreements are capable of being specifically en-

Mass. (14 Gray) 195, it is *held* that subsequent creditors may not prove their claims directly against the estate of the deceased partner in competition with his individual creditors.

41 See Blodgett v. American National Bank (1881), 49 Conn. 9, where the court speaks of the provision as conferring a power coupled with an interest, and therefore irrevocable by death; Laughlin v. Lorenz (1864), 48 Pa. 275, 86 Am. Dec. 592. (See comments on this case in Wilcox v. Derickson (1895), 168 Pa. 331, 337, 31 Atl. 1080.)

42 See Stanwood v. Owen, *supra;* Dowse v. Gorton [1891], App. Cas. 190.

43 See Robinson v. Simmons, *supra;* Poole v. Munday (1869), 103 Mass. 174.

forced.[44] They may also be so framed as to be practically automatically operative, at least as between the parties.[45]

In a late case an agreement that the survivor should have the entire interest without paying anything for it, and that the interest of any partner should cease on his death, was denied enforcement.[46]

§ 411. Liability of estate of deceased partner for existing debts.—Although, as has been seen,[47] causes of action against the firm, at law, survive against the surviving partners only, the estate of the deceased partner is not thereby released from all liability on existing debts to the partnership creditors.[48]

44 See Maddock v. Astbury (1880), 32 N. J. Eq. 181, Mechem's Cas. 936; McKinnon v. McKinnon (1893), 5 C. C. A. 530, 56 Fed. 409; Murphy v. Murphy (1914), 217 Mass. 233, 104 N. E. 466; Gaut v. Reed (1859), 24 Tex. 46, 76 Am. Dec. 94; Rankin v. Newman (1896), 114 Cal. 635, 46 Pac. 742, 34 L. R. A. 265; Scharringhausen v. Luebsen (1893), 52 Mo. 337 (optional); Kaufmann v. Kaufmann (1913), 239 Pa. 42, 86 Atl. 634; Morris v. Kearsley (1837), 2 Y. & C. Ex. 139; Essex v. Essex (1855), 20 Beav. 442; King v. Chuck (1853), 17 Beav. 325; Hibben v. Collister (1900), 30 Can. Sup. Ct. 459. See, also, Fitzsimmons v. Lindsay (1903), 205 Pa. 79. But if not enforceable as a contract, it must, it is said, be executed as a will so as to be enforceable as such. Ferrara v. Russo (1917), 40 R. I. 533, 102 Atl. 86, L. R. A. 1918 B 905. See, also, Gomez v. Higgins (1900), 130 Ala. 493, 30 So. 417.

45 See *In re* Simpson (1874), 9 Ch. App. 572, where Mellish, L. J., said: "I am of opinion that the whole interest in the assets passed immediately on the death of one partner to the survivors." The estate of the deceased then has, of course, the right to recover the compensation stipulated for in the agreement.

46 Fleming v. Fleming (1919) — Iowa —, 174 N. W. 946. Compare Stewart v. Todd (1919), — Iowa —, 173 N. W. 619.

47 See *ante*, § 402.

48 As to the debts existing at the time of the dissolution the estate of the deceased partner remains liable (though the *form* of procedure is changed) to the partnership creditors (unless there has been a release, a novation, or something of that sort as discussed *post*, § 429), and this is true, notwithstanding that there may have been dealings with the survivors since the death. See Mason v. Tiffany (1867), 45 Ill. 392; McGill v. McGill (1859), 2 Metc. (Ky.) 258; Daniel v. Cross (1796), 3 Ves. 277; Sleech's Case (1816), 1 Meriv. 530; Devaynes v. Noble (1831), 2 Russ. & M. 495; Winter v. Innes (1838), 4 Mylne & C. 101.

The surviving partners who had paid the debt might have contribution in equity from the estate of the deceased partner,[49] and this equity of the surviving partners may be extended to the creditor himself. But more than this, it may be said that there is an independent right of the creditor in equity to proceed as though the partnership obligation were joint and several.[50] At any rate, the rule is now established in England and many of the United States that the creditor may proceed either against the survivors at law, or, without having any recourse to them or attempting to exhaust the partnership assets, he may in equity proceed at once against the estate of the deceased partner.[51] In several states by statute this method of procedure is expressly authorized.[52] Other states, however, such as New York, Georgia, Wisconsin and perhaps some others have declined to adopt this rule, and since the survivor is the one who has the possession and administration of the partnership assets, permit recourse to the estate of the deceased only after the plaintiff has ex-

49 If the surviving partner has paid the debts and there was a deficiency of assets for that purpose, he may have contribution from the estate of the deceased partner. In some states he may keep that estate open by filing a contingent claim. If that estate has been distributed before he can present his claim, he may, in some states, recover from the distributees who have received the assets of that estate. See Blakely v. Smock (1897), 96 Wis. 611, 71 N. W. 1052; Logan v. Dixon (1889), 73 Wis. 533, 41 N. W. 713.

50 See the discussions in Kendall v. Hamilton (1879), 4 App. Cas. 504, Gilm. Cas. 293, and especially Lord Selborne's opinion at p. 538. See, also, Beresford v. Browning (1875), L. R. 1 Ch. D. 30.

51 See Doggett v. Dill (1884), 108 Ill. 560, 48 Am. Rep. 565, Mechem's Cas. 513, Burd. Cas. 495, Gilm. Cas. 300, where many cases are collected; Nelson v. Hill (1847), 5 How. (U. S.) 127; Fillyan v. Laverty (1850), 3 Fla. 72; Freeman v. Stewart (1866), 41 Miss. 138; Newman v. Gates (1905), 165 Ind. 171, 72 N. E. 638; Camp v. Grant (1851), 21 Conn. 41, 54 Am. Dec. 321; Union Trust Co. v. Shoemaker (1913), 258 Ill. 564, 101 N. E. 1050.

Proceedings in probate courts are usually "equitable" within this rule.

Where the obligation was several as well as joint, the creditor may proceed directly against the estate of the deceased partner. Filley v. Phelps (1847), 18 Conn. 294.

52 Thus, see Camp v. Grant (1851), 21 Conn. 41, 54 Am. Dec. 321; Manning v. Williams (1851), 2 Mich. 105; Ralston v. Moore (1885), 105 Ind. 243, 4 N. E. 673; Blair v. Wood (1884), 108 Pa. 278; McLain v. Carson (1842), 4 Ark. 164, 37 Am. Dec. 777, Gilm. Cas. 304.

hausted his remedies against the survivor.[53] In some of these states, this rule has now been changed by statute.[54]

As will be seen hereafter, partnership creditors pursuing the separate estate of the deceased partner in equity are usually postponed until his individual creditors have been satisfied.[55]

The Uniform Partnership Act provides that "The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts."[56]

2. *Dissolution by Bankruptcy, Insolvency, Assignment, Etc.*

§ 412. In general.—Somewhat similar questions are raised where the partnership is dissolved by the bankruptcy, insolvency or assignment of some or all of the partners, though the cases are obviously not identical with that of the death of a partner which completely removes him from the field of action. The law as to some of the points is not entirely clear.

§ 413. Bankruptcy, insolvency or assignment of entire firm.—Where *all* of the partners, in their partnership relation, *i. e.*, the firm, become bankrupt, insolvent in the statutory sense, or assign all of the partnership property for the benefit of creditors, the effect upon their authority thereafter to administer the partnership affairs, is usually not difficult of determination. Such an event ordinarily results in the appointment of some one else to act in the matter, and terminates or suspends the authority of the partners.

§ 414. Bankruptcy of one partner—Solvent partner may administer.—The present bankruptcy act provides that "in the event of one or more but not all of the members of a partner-

53 See Pope v. Cole (1873), 55 N. Y. 124, 14 Am. Rep. 198; Sherman v. Kreul (1877), 42 Wis. 33; Pullen v. Whitfield (1875), 55 Ga. 174; Pearson v. Keely (1845), 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160.

54 See Smith Lumber Co. v. Fitzhugh (1918), 167 Wis. 355, 167 N. W. 455; *Cf.* Seligman v. Friedlander (1910), 138 N. Y. App. Div. 784, 123 N. Y. S. 583, 199 N. Y. 373, 92 N. E. 1047.

55 See *post*, § 453.

56 Sec. 36 (4).

ship being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt."[57] This statute clearly gives to the solvent partner, unless he relinquishes it, the right to administer the partnership assets, including, of course, the right to the possession and control of them for that purpose.[58] This right of administration is said to be a personal one, which the solvent partner cannot transfer to a third person.[59] In suing for the recovery of the partnership assets the solvent partner may doubtless join the representatives of the bankrupt partner, though the latter would undoubtedly be entitled to an indemnity against the costs and expenses of unsuccessful actions.[60]

§ 415. Insolvency, assignment, selling out, of one partner.— As has been seen, a dissolution of the partnership does not necessarily result from the mere insolvency of one partner; but where he assigns all his property for the benefit of his creditors or where his entire interest in the partnership is seized and sold by his creditors, a dissolution will frequently result.[61] In such

57 The Bankruptcy Act of 1898, § 5, subd. h. See Appendix. As to the effect on his partnership liability of a discharge in bankruptcy of one partner, see Loomis v. Wallblom (1905), 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771, Gilm. Cas. 584 (discharges him); Corey v. Perry (1877), 67 Me. 140, 24 Am. Rep. 15, Burd. Cas. 466 (does not necessarily).

58 See *In re* Bertenshaw [1907], 85 C. C. A. 6, 157 Fed. 363, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986.

59 Fraser v. Kershaw [1856], 2 K. & J. 496, s. c., 25 L. J. Ch. 445, 2 Jur. part I (N. S.) 880, 4 W. R. 431; Vetterlein v. Barnes (1880), 6 Fed. 693.

60 See *Ex parte* Owen (1884), 13 Q. B. Div. 113; Heilbut v. Nevill [1869], 4 L. R. C. P. 354; Lindley on Partnership (7th ed.), pp. 326, 714, note m, 739.

In *Ex parte* Owen, *supra*, Cotton, L. J., said: "In my opinion, when one partner in a firm has become a bankrupt, the solvent partner has the right to get in, and to insist on getting in, the assets of the dissolved partnership, and has even a right to use for that purpose the name of the trustee in bankruptcy, on giving him an indemnity."

61 See *ante*, §§ 363, 364.

a situation the tendency of the more modern cases is to treat the solvent partner very much like a surviving partner so far as the possession and administration of the assets are concerned. Some of the cases speak of the legal title as surviving in him,[62] but this seems to be doubtful,[63] though he doubtless has the right to possess, control and dispose of the assets for the purposes of closing up the business.[64]

Under Uniform Partnership Act, sec. 27, a dissolution does not necessarily result.

62 See Ogden v. Arnot (1883), 29 Hun (N. Y.) 146, Mechem's Cas. 996, Burd. Cas. 461; Russell v. Cole (1896), 167 Mass. 6, 44 N. E. 1057, 57 Am. St. R. 432, Burd. Cas. 469; Horton's Appeal (1850), 13 Pa. 67; Harvey v. Crickett (1816), 5 Maule & Sel. 336; Fern v Cushing (1849), 4 Cush. (Mass.) 357, Ames' Cas. 271, Burd. Cas. 464, Gilm. Cas. 581; Fish v. Thompson (1895), 68 Vt. 273, 35 Atl. 174, Burd. Cas. 3. Compare Hubbard v. Guild (1853), 8 N. Y. Super. Ct. 662; Murray v. Murray (1821), 5 Johns. Ch. (N. Y.) 60, Burd. Cas. 451, Gilm. Cas. 578.

63 See as to rights of action, solvent partner and assignee must join as plaintiffs: Pugh v. Holliday (1854), 3 Ohio St. 284; Halsey v. Norton (1871), 45 Miss. 703, 7 Am. Rep. 745, Mechem's Cas. 447, Gilm. Cas. 583. Action properly brought in names of both partners, notwithstanding insolvency proceedings against one of them. Russell v. Cole, *supra*.

64 See Horton's Appeal (1850), 13 Pa. St. 67; Chase v. Scott (1871), 33 Iowa 309; Renton v. Chaplain (1852), 9 N. J. Eq. 62; Miller v. Brigham (1875), 50 Cal. 615; Reece v. Hoyt (1853), 4 Ind. 169 (where one sells out, other has right to possession and winding up); Hamill v. Hamill (1867), 27 Md. 679 (same where one absconds); McGlensey v. Cox (1852), 1 Am. L. Reg. 34, 1 Phila. (Pa.) 378. The court will not interfere with the right of the remaining partner to administer except upon a showing of incompetency, mismanagement or improper conduct: Reece v. Hoyt, *supra;* McGlensey v. Cox, *supra*.

In Ogden v. Arnot, *supra*, it is held that the solvent partner may not only sell the firm property for the purposes of administration, but may also mortgage it to secure a firm debt, even though this may result in a preference to the creditor so secured, in a state wherein a debtor may prefer creditors. In Renton v. Chaplain [1852], 9 N. J. Eq. 62, the court said: "It is true the partnership, by the sale, is dissolved. But why should the court interfere with the other partner in settling up the concerns of the partnership? Why should its management be taken out of his hands and transferred to an officer of this court? The object in view is to secure to the purchaser the benefit of his purchase. But the rights of the solvent partner are entitled to some regard, and the interests of the creditors of the firm are to be protected.

If what was seized or assigned were not his entire interest, but only a portion of it, or only his interest in certain specified chattels,—granting that that were possible,—then the effect as an act of dissolution seems less clear.

§ 416. ——Although the continuing partner is here spoken of as the *solvent* partner, it is doubtless true that, even if he were insolvent in the legal sense, he would nevertheless, if undisturbed in his possession and not proceeded against, be permitted to close up the business.

If there were several partners, and the interests of more than one were successively seized by their individual creditors, but one solvent partner remained, he would doubtless have the right to administer.[65]

If his interest also were finally seized by his separate creditor, the firm title would not thereby be necessarily divested, nor his right to continue the settlement necessarily be terminated, although, as a practical matter, such a situation would be likely to lead to bankruptcy or insolvency proceedings against the partnership.

§ 417. ——**Rights of assignee of such partner's interest.**— As has already been seen, one who acquires the interest of one

Who so competent to protect and secure those rights and interests as the solvent partner, who has everything at stake, and whose familiarity with the engagements and transactions of the concern gives him very greatly the advantage over anyone else that could be substituted for the purpose? Does it follow because one partner has become insolvent, the other is dishonest, and must be dealt with as a wrong-doer —be deprived of his property, and subjected to great embarrassment and unnecessary expense and loss? What rights and interests does the purchaser acquire, and how does this purchase affect the other partner? He stands in no better situation than the debtor himself. The solvent partner has a specific lien upon the property, to liquidate the partnership debts, and upon the residue until all the equities between the partners are settled.''

The contrary seems to have been held in Hubbard v. Guild [1853], 8 Super. Ct. N. Y. (1 Duer) 662.

65 See, for example, the discussion in such cases as Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 194, Ames' Cas. 229, Burd. Cas. 222, Gilm. Cas. 251; Doner v. Stauffer (1829), 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370, Ames' Cas. 302, Burd. Cas. 218, Gilm. Cas. 247; Coover's Appeal (1857), 29 Pa. 9, 20 Am. Dec. 149.

partner only in the partnership, as by attachment or execution sale, mortgage or assignment, does not thereby become a partner with the solvent partner,—the *delectus personae* prevents that,—nor does he thereby acquire the right to join with the solvent partner in continuing or closing up the business.[66] He does, however, acquire the right to demand that the solvent partner shall close up the affairs of the partnership with reasonable despatch under the terms of the partnership and account to him for what remains, if anything, of the *pro rata* share of the partner whose interest was so acquired. If the partnership were entirely insolvent, he would, of course, get nothing. His remedy to ascertain and secure his interest would ordinarily be by a bill for an accounting against the settling partner.[67] Some of the cases speak of him as a tenant in common with the other partner,[68] but that is not a wholly accurate designation.

While he has thus a right to secure whatever share may be coming to him, he would not, merely by acquiring the interest,

[66] The Uniform Partnership Act, which provides [Sec. 25 (2) (b)] that, "a partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property," also provides (Sec. 27) that "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners, in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive, in accordance with his contract, the profits to which the assigning partner would otherwise be entitled."

[67] See Claggett v. Kilbourne (1861), 66 U. S. (1 Black) 346, 17 L. ed. 213; Lothrop v. Wightman (1861), 41 Pa. 297; Barrett v. McKenzie (1877), 24 Minn. 20; Farley v. Moog (1885), 79 Ala. 148, 58 Am. Rep. 585.

Under the Uniform Partnership Act, Sec. 27 (2), if the assignment results in a dissolution, "the assignee is entitled to receive his assignor's interest, and may require an account from the date only of the last account agreed to by all the partners."

[68] See Murray v. Murray (1821), 5 Johns. Ch. (N. Y.) 60, Burd. Cas. 451, Gilm. Cas. 578 (bankruptcy case); Halsey v. Norton (1871), 45 Miss. 703, 7 Am. Rep. 745, Mechem's Cas. 447, Gilm. Cas. 583 (bankruptcy case).

become liable for any deficiency in assets to pay partnership debts to which the partner, whose interest he acquired, might have been liable.

As has been already seen, the Uniform Partnership Act gives the purchaser of a partner's interest, in a partnership terminated or determinable at will, the right to apply to a court for a dissolution.[69]

§ 418. **Other causes.**—Similar rules would doubtless be applied where the dissolution results from marriage, insanity, and the like, leaving part of the partners legally competent and the other incompetent. The legally competent would doubtless be ordinarily authorized and permitted to act in closing up the business.

3. *Dissolution by Judicial Decree.*

§ 419. **Receivership usually results.**—Where the partnership is dissolved by judicial decree,—a matter considered in an earlier section,[70] there will frequently if not usually be a receiver appointed,[71] under whose control the partnership affairs will be closed up. Such an appointment will ordinarily supersede the administration of partnership affairs by the partners themselves.

4. *Dissolution by Other Causes.*

§ 420. **Rights and liabilities of partners after dissolution—In general.**—Attention must next be given to the cases wherein the partnership is dissolved by lapse of time, mutual consent, the act of one partner, or other acts or events which do not affect the existence, status, liberty or capacity to act, of any of the partners.

Whatever rights have then vested in and accrued to the partners remain undestroyed by the dissolution. Their property is still theirs; their rights in action are still enforceable. Only those rights which depend upon the continuance of the partnership will be affected.

69 Sec. 32 (2).

70 *Ante*, §§ 373, 374.

71 See *ante*, § 231.

Existing liabilities, of course, will not be discharged. Continuing contracts will usually be affected only where the continuance of the partnership was an express or implied condition.[72]

§ 421. Authority of firm, as agent for third persons, after dissolution.—In accordance with the rule referred to in an earlier section,[73] it is held that where a firm has, as a partnership, been appointed agent for a third person, the dissolution of the partnership will ordinarily terminate the agency.[74]

§ 422. Rights of partners after dissolution under Uniform Partnership Act—Effect of wrongful dissolution.—The Uniform Partnership Act provides that when the partnership is dissolved in any way, except in contravention of the partnership agreement, each partner shall have the right to have the debts paid out of the assets and receive his share of the surplus in cash. But where the partnership is dissolved by the rightful expulsion of a partner, or any partner causes dissolution in contravention of the partnership agreement, the rights of such partner are much limited. In the former case, he is entitled "to receive in cash only the net amount due him from the partnership;" and in the other case, he is liable to his copartners for damages for the wrongful dissolution, and the other partners may, if they so desire, continue the business for the residue of the term and keep and use all the partnership property, upon giving him a bond to pay, or in fact paying, the value of his interest less these damages, and upon indemnifying him against all present and future partnership debts. His interest in the good will is not to be considered. If the other partners do not continue the business, he is entitled to receive his share less the damages.[75]

"Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership * * * have the right to wind up the partnership affairs."[76]

[72] See Brace v. Calder [1895], 2 Q. B. 253.

[73] See *ante*, § 401.

[74] See Schlau v. Enzenbacher (1914), 265 Ill. 626, 107 N. E. 107, L. R. A. 1915 C 576; Holbert v. Keller (1913), 161 Iowa 723, 142 N. W. 962.

[75] Sec. 38. Appendix.

[76] Sec. 37.

§ 423. Authority of partners after dissolution — Authority continues for the purpose of closing up the business.—Such a dissolution of the partnership terminates entirely the authority of each partner to continue to bind his partners by *new* contracts. The authority of each partner is thenceforward limited to closing up the partnership affairs, but for this purpose his authority is deemed to continue, with all the rights and incidents as before. Thus either partner may, after dissolution, receive payment of firm debts and give discharges therefor; sell partnership property; pay firm debts; complete unfinished but binding undertakings; accept or give proper notices respecting them; make, receive or waive incidental demands; or, generally, do any other act respecting the closing up of previous transactions which he might do if the partnership still continued.[77]

Unless they agree otherwise, each of the former partners has an equal right to the possession of the assets, and is under an

77 See Major v. Hawkes (1850), 12 Ill. 298, Gilm. Cas. 403; Heartt v. Walsh (1874), 75 Ill. 200; Ruffner v. Hewitt (1874), 7 W. Va. 585; Seldner v. Mt. Jackson Nat. Bank (1887), 66 Md. 488, 59 Am. Rep. 190; Perkins v. Butler Co. (1895), 44 Neb. 110, 62 N. W. 308; Western Stage Co. v. Walker (1856), 2 Iowa 504, 65 Am. Dec. 789; Davis v. Megroz (1893), 55 N. J. L. 427; Lapenta v. Lettieri (1899), 72 Conn. 377, 44 Atl. 730, 77 Am. St. R. 315; Page v. Wolcott (1860), 81 Mass. (15 Gray) 536; Gordon v. Albert (1897), 168 Mass. 150, 46 N. E. 423; Holmes v. Shands (1854), 27 Miss. 40.

In Butchart v. Dresser (1853), 4 DeG. M. & G. 542, 10 Hare 453, Ames' Cas. 563, Burd. Cas. 363, it was held that the mere fact that the two partners differed as to whether an existing contract should be performed or broken did not deprive one of his authority to perform it.

Demand of payment to charge endorser of note may be sufficiently made of one of former firm of makers: Gates v. Beecher (1875), 60 N. Y. 518, 19 Am. Rep. 207, Mechem's Cas. 1020, Burd. Cas. 372. Waiver of demand made by one after dissolution will bind other partners: Darling v. March (1842), 22 Me. 184, Gilm. Cas. 409; Seldner v. Bank (1887), 66 Md. 488, 8 Atl. 262, 59 Am. Rep. 190. Notice of dishonor to one member of partnership dissolved by war is sufficient: Hubbard v. Matthews (1873), 54 N. Y. 43, 13 Am. Rep. 562.

There being no assignment, in law or in fact, and no survivorship here, the general rules as to parties to action (*ante*, § 324, et seq.), are not ordinarily affected by the dissolution: See Fish v. Gates (1882), 133 Mass. 441; Mudd v. Bast (1864), 34 Mo. 465.

equal duty to apply them to the discharge of partnership obligations.[78]

Where there are more than two partners, the majority have the same power to control the winding up of the business that they have to direct its conduct before dissolution.[79]

§ 424. —— Within this narrow field of closing up the business there is here, unlike the case of the surviving partner,[80] a real agency and not merely a right to incur expenses, binding himself only in the first instance, but with a right to contribution; the authorized acts of the partner impose direct contractual obligations upon his partners as they would have done before dissolution.

Under the Uniform Partnership Act after dissolution each partner (with certain exceptions named [81]) "can bind the partnership * * * by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution." [82]

The mere fact that a partner is insolvent does not, it is held, *per se* disqualify him from acting; [83] but under the Uniform Partnership Act his bankruptcy would disqualify him.[84]

§ 425. —— **No authority to create new obligations.** — But except for the closing up or completion of old transactions the authority of each partner after dissolution is ended. He cannot create new obligations, or vary the character, form or obligation of those already existing.[85] Hence he cannot, after

78 Gray v. Green (1894), 142 N. Y. 316, 37 N. E. 124, 40 Am. St. R. 596.

79 Western Stage Co. v. Walker, *supra*.

80 *Ante*, § 402.

81 Not, where the business has become unlawful, by any act except one appropriate for winding up the affairs; not where the partner who assumes to act has become a bankrupt; not, where the agreements exclude him, except in certain cases wherein the person dealing with him had no notice or knowledge of his lack of authority. Sec. 35 (3).

82 Sec. 35 (1) (*a*).

83 See Heartt v. Walsh, *supra*.

84 Sec. 35 (3) (*b*).

85 Thus, for example, if negotiations pending had not ripened into a contract at the time of notice of the dissolution, there is no authority ordinarily to complete it afterward. See Goodspeed v. Plow Co. (1881), 45 Mich. 322, 7 N. W. 902, Gilm. Cas. 404.

dissolution, bind his partners by making, accepting, indorsing or renewing negotiable paper;[86] create a new or revive an old debt against them; remove the bar of the statute of limitations as to them;[87] or bind them by admissions or declarations not relating to the settlement of prior transactions;[88] provided, of course, in all cases, that due notice of the dissolution had been given.[89]

[86] See Humphries v. Chastain (1848), 5 Ga. 166, 48 Am. Dec. 247, Mechem's Cas. 532, Gilm. Cas. 408; White v. Tudor (1860), 24 Tex. 639, 76 Am. Dec. 126; Palmer v. Dodge (1854), 4 Ohio St. 21, 62 Am. Dec. 271, Gilm. Cas. 405; Campbell v. Herrick (1919), 104 Kan. 657, 180 Pac. 237; Bank of Montreal v. Page (1881), 98 Ill. 109; Robb v. Mudge (1860), 80 Mass. (14 Gray) 534; Woodson v. Wood (1888), 84 Va. 478, 5 S. E. 277; Clement v. Clement (1887), 69 Wis. 599, 35 N. W. 17, 2 Am. St. R. 760. Fact that it was for an antecedent debt does not change the rule, except when made in pursuance of binding agreement made before dissolution: Richardson v. Moies (1862), 31 Mo. 430, Burd. Cas. 366. Might indorse "without recourse" when necessary to pass title for a partnership purpose. Waite v. Foster (1851), 33 Me. 424; Yale v. Eames (1840), 1 Metc. (Mass.) 486.

[87] Van Keuren v. Parmelee (1849), 2 N. Y. 523, 51 Am. Dec. 322, Mechem's Cas. 533; Tate v. Clements (1878), 16 Fla. 339, 26 Am. Rep. 709; Mayberry v. Willoughby (1877), 5 Neb. 368, 25 Am. Rep. 491, Gilm. Cas. 413; Kallenbach v. Dickinson (1881), 100 Ill. 427, 39 Am. Rep. 47; Miller v. Meimerick (1857), 19 Ill. 172, Gilm. Cas. 412.

There are cases holding otherwise as to the power of one partner to prevent the operation of the statute of limitations by admissions or payments, following Whitcomb v. Whiting (1781), 2 Doug. 652, Mechem's Cas. 1025, and Wood v. Braddick (1808), 1 Taunt. 104, Mechem's Cas. 1026, Ames' Cas. 607, Burd. Cas. 369, Gilm. Cas. 411, such as Beardsley v. Hall (1869), 36 Conn. 270, 4 Am. Rep. 74; Merritt v. Day (1875), 38 N. J. L. 32, 20 Am. Rep. 362, (compare Parker v. Butterworth (1884), 46 N. J. L. 244) but the weight of authority is opposed to these cases.

The question is now frequently regulated by the statute, which declares, *e. g.*, that one shall not lose the benefit of the statute by reason of any promise, etc., made by another.

[88] See Pennoyer v. David (1860), 8 Mich. 407, Mechem's Cas. 543; Feigley v. Whitaker (1872), 22 Ohio St. 606, 10 Am. Rep. 778, Mechem's Cas. 550; Maxey v. Strong (1876), 53 Miss. 280. Compare Hackley v. Patrick (1808), 3 Johns. (N. Y.) 536; Baker v. Stackpoole (1827), 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Hart v. Woodruff (1881), 24 Hun (N. Y.) 510, Burd. Cas. 370, admission of one after dissolution does not bind others.

[89] In Tate v. Clements, *supra*, it

Subordinate and incidental expenses, necessary to the main purpose of winding up the business, *e. g.*, clerical help, insurance of goods, storage, and the like, are not deemed *new* obligations within this prohibition.[90]

§ 426. Authority of settling or liquidating partner.—Instead of all the partners participating in the settlement of the partnership affairs after dissolution, as contemplated in the last section, the partners may, upon such dissolution, agree that one of the partners only shall proceed to liquidate the affairs of the firm. An express agreement to this effect is not indispensable; it may be shown by acquiescence.[91] The effect of such an agreement is not to enlarge the authority of the settling partner, but to exclude the others from participation. Such an agreement could not, of course, affect third persons who had no notice of it, but if they have notice of special arrangements they will be subject to the equities of the partners if they do not deal only with the partner so specified.[92]

The liquidating partner is bound to be diligent and must not unreasonably prolong the settlement. If he does, equity may interfere. His duty of good faith and fair dealing is perhaps intensified by his position as sole administrator.

He has, like any other partner after dissolution, authority to wind up and complete partnership transactions only, and not

is, indeed, said that notice is not necessary, as the requirement of notice has reference to future dealings only; but see Clement v. Clement, *supra;* Sage v. Ensign (1861), 2 Allen (Mass.) 245. Compare Green v. Baird (1893), 53 Ill. App. 211.

90 See Conrad v. Buck (1883), 21 W. Va. 396; Stebbins v. Willard (1881), 53 Vt. 665.

91 See Wilson v. Waugh (1882), 101 Pa. 233, Mechem's Cas. 546.

92 See Gillilan v. Sun Mut. Ins. Co. (1869), 41 N. Y. 376.

Under the Uniform Partnership Act, the partnership is not bound by any act of a partner who has no authority to wind up partnership affairs, except by a transaction with one who had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority, or with one who had not extended credit prior to dissolution if he had no knowledge or notice of his want of authority—and if the fact of such want of authority had not been advertised as required for dissolution. Sec. 35 (3) (*c*).

to create new debts or obligations against his former partners;[93] but for the purposes of winding up, collecting debts, discharging obligations, and reducing the assets to an available and distributable form, all the powers of the partners are concentrated in him and may be exercised accordingly.[94]

[93] See White v. Tudor, *supra;* Conrad v. Buck (1883), 21 W. Va. 396; Bank of Montreal v. Page, *supra.* Not authorized to give notes: Potter v. Tolbert (1897), 113 Mich. 486, 71 N. W. 849, Burd. Cas. 367.

[94] See Palmer v. Dodge (1854), 4 Ohio St. 21, 62 Am. Dec. 271, Gilm. Cas. 405; Hilton v. Vanderbilt (1880), 82 N. Y. 591; Gilmore v. Ham (1894), 142 N. Y. 1, 36 N. E. 826, 40 Am. St. R. 554. In Pennsylvania, see Estate of Davis (1840), 5 Whart. 530, 34 Am. Dec. 574; Fulton v. Central Bank (1879), 92 Pa. 112; Earon v. Mackey (1884), 106 Pa. 452; Wilson v. Waugh, *supra.*

CHAPTER XVIII.

OF SPECIAL AGREEMENTS BETWEEN THE PARTNERS AT DISSOLUTION.

§ 427. **Agreements as to distribution of property or payment of debts.**—It is not uncommon for the partners to agree at dissolution as to the distribution of the partnership property or the payment of the partnership debts. Thus, an agreement that the continuing partner shall assume and pay the partnership debts is often made, and, even though not expressly made, would often be implied. Thus, where one partner sells out to his co-partners under circumstances indicating that they are estimating and buying his interest *over and above* the amount of the indebtedness, there is held to be an implied assumption of the debts on their part, where nothing appears to the contrary.[1] But where one partner sells out to a stranger who assumes the seller's obligations and forms a new partnership with the other partners to continue the business, an agreement by such other partners to assume the existing debts will, it is held, be implied only to the extent of the firm assets received by the continuing partners.[2] It is not an agreement to answer

[1] See Cobb v. Benedict (1900), 27 Colo. 342, 62 Pac. 222, Mechem's Cas. 557.

As to the effect of such a sale as an accounting and adjustment of partnership and individual claims, see Lesure v. Norris (1853), 65 Mass. (11 Cush.) 328; Wiggin v. Goodwin (1873), 63 Me. 389; Pierce v. Ten Eyck (1890), 9 Mont. 349, 23 Pac. 423.

[2] See Hobbs v. Wilson (1865), 1 W. Va. 50; Peyton v. Lewis (1851), 12 B. Mon. (Ky.) 356, Mechem's Cas. 1028. See, also, LaMontagne v. Bank (1905), 183 N. Y. 173, 76 N. E. 33; Sheppard v. Bridges (1911), 137 Ga. 615, 74 S. E. 245.

Where certain members of a partnership with transferable shares (a "joint stock company") sold and transferred their shares to persons

for the debt of another, and is therefore valid though not in writing.[3]

Such agreements are entirely valid as between the partners themselves, but they do not bind the firm creditors unless the latter become a party to them. The liability of each partner for the payment of the partnership debts continues *in solido* after dissolution as before; and creditors cannot be cut off from their remedies by any agreement between the partners alone. They neither lose their right to proceed against the partner in whose favor the arrangement is made, nor are they required to first exhaust their remedies against the other.

The Uniform Partnership Act is to the same effect.[4]

§ 428. —— Creating relation of principal and surety.—Such an agreement, however, it has been held, in England and several of the States, creates the relation of principal and surety between the partners—the partner assuming the debts being the principal and the other the surety,—and creditors who have notice of this arrangement have been held bound to respect the rights of the surety as in other cases.[5] Thus, it has been held

who were accepted as members in their place, this (while not releasing the transferers from their liability to existing creditors) amounts to an undertaking by the association to assume and indemnify them against such liability, and therefore members of the association who have later paid those debts cannot recover contribution from the retired members: Savage v. Putnam (1865), 32 N. Y. 501.

3 See Hunt v. Rogers (1863), 7 Allen (Mass.), 469; Vanness v. Dubois (1878), 64 Ind. 338.

4 See sec. 36: "(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner. * * * (4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts."

5 See Oakley v. Pasheller (1836), 4 Cl. & F. 207, 10 Bligh (N. S.) 548; Rouse v. Bradford Banking Co. [1894], App. Cas. 586; Colgrove v. Tallman (1876), 67 N. Y. 95, 23 Am. Rep. 90; Campbell v. Floyd (1892), 153 Pa. 84, 25 Atl. 1033, 1038; Preston v. Garrard (1904), 120 Ga. 689, 49 S. E. 118, 102 Am. St. R. 124, Gilm. Cas. 334. See Smith v. Sheldon (1876), 35 Mich. 42, 24 Am. Rep. 529, Mechem's Cas. 583, Gilm. Cas. 332; Brill v. Hoile (1881), 53 Wis. 537, 11 N. W. 42; Leithauser v. Baumeister (1891), 47 Minn. 151, 49 N. W. 660, 28 Am. St. R. 336; Porter v. Baxter (1898), 71 Minn. 195, 73 N. W. 844. See, also, Tillis v.

that a binding and definite extension of time[6] to the partner who has thus become the principal debtor, or a substantial change of terms,[7] or a neglect or refusal on request to collect of the principal debtor while he was solvent,[8] or a release of securities[9] will release the other; and if the latter pays the debt he is entitled to the benefit of the securities which the creditor held against the principal debtor.[10]

On the other hand there is a considerable number of cases which emphatically deny that it is within the power of the partners by any arrangement between themselves alone to alter the relation in which they stood when the obligation was incurred or to impose upon the creditor any limitations or obligations which were not an incident to the original relation.[11]

The Uniform Partnership Act adopts substantially the view first stated.[12]

Folmar (1906), 145 Ala. 176, 39 So. 913, 117 Am. St. R. 31; Fernald v. Clark (1892), 84 Me. 234, 24 Atl. 823.

6 Smith v. Sheldon, *supra;* Brill v. Hoile, *supra;* Leithauser v. Baumeister, *supra;* Campbell v. Floyd, *supra;* Preston v. Garrard, *supra.* Mere forbearance is not enough: Powers v. Silberstein (1888), 108 N. Y. 169, 15 N. E. 185.

7 See Porter v. Baxter, *supra.*

8 Where the right to make such a demand is recognized as part of the law of principal and surety. Colgrove v. Tallman, *supra.*

9 See Bell v. Hall (1846), 5 N. J. Eq. 477. Compare First Nat. Bank v. Cheney (1896), 114 Ala. 536, 21 So. 1002; Johnson v. Jones (1913), 39 Okla. 323, 135 Pac. 12, 48 L. R. A. (N. S.) 547.

10 See Johnson v. Young (1882), 20 W. Va. 614. Compare Sands v. Durham (1901), 99 Va. 263, 38 S. E. 145, 54 L. R. A. 614, 86 Am. St. R. 884.

11 See Barnes v. Boyers (1890), 34 W. Va. 303, 12 S. E. 708, Mechem's Cas. 589; McCoy v. Jack (1899), 47 W. Va. 201, 34 S. E. 991; National Cash Register Co. v. Brown (1897), 19 Mont. 200, 47 Pac. 995, 37 L. R. A. 515, 61 Am. St. Rep. 498; Grotte v. Weil (1901), 62 Neb. 478, 87 N. W. 173, Mechem's Cas. 592; Dean v. Collins (1906), 15 N. Dak. 535, 108 N. W. 242, 9 L. R. A. (N. S.) 49, 125 Am. St. R. 610, 11 Ann. Cas. 1027; McAreavy v. Magirl (1904), 123 Iowa 605, 99 N. W. 193, Gilm. Cas. 330; Clinchfield Fuel Co. v. Lundy (1914), 130 Tenn. 135, 169 S. W. 563, L. R. A. 1915 B 418; Shapleigh Hardware Co. v. Wells (1896), 90 Tex. 110, 37 S. W. 411, 59 Am. St. R. 783; Rawson v. Taylor (1876), 30 Ohio St. 389, 27 Am. Rep. 464.

12 Sec. 36 (3): "Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the

§ 429. —— Creditor's assent to arrangement. — An assent, however, by the creditor to the assumption by one partner of the firm's debt to such creditor, and an agreement by the creditor to look to such partner alone for payment, if upon a sufficient consideration, will amount to a novation and discharge the retiring partner. Such assent must be actual, though it need not be express or formal. It may be inferred from words or conduct reasonably justifying the conclusion that he had released the retiring partner and accepted the continuing one in his stead.[13] It will not ordinarily be inferred from mere silence.[14] And unless there is a sufficient consideration, the agreement of the creditor to release the retiring partner and look only to the others will not be binding,[15] but the acquisition of the separate indebtedness of one partner would ordinarily furnish a sufficient consideration for the discharge of the joint obligation of all.[16] Not so, however, where the partnership obligation was already several as well as joint.[17]

agreement, consents to a material alteration in the nature or time of payment of such obligations.''

13 See First National Bank v. Green (1884), 40 Ohio St. 431, Mechem's Cas. 1031; York v. Orton (1885), 65 Wis. 6, 26 N. W. 166; Thompson v. Percival (1834), 5 B. & Ad. 925; Hart v. Alexander (1837), 2 M. & W. 484; First Nat. Bank v. State Savings Bank (1902), 130 Mich. 332, 89 N. W. 941; Johnson v. Jones, *supra;* Hall v. Jones (1876), 56 Ala. 493, Gilm. Cas. 339; Kirwan v. Kirwan (1834), 2 C. & M. 617, Burd. Cas. 384; Walstrom v. Hopkins (1883), 103 Pa. 118.

The Uniform Partnership Act is to the same effect. Sec. 36: ''(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor, and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.''

14 Eagle Mfg. Co. v. Jennings (1883), 29 Kan. 657, 44 Am. Rep. 668, Mechem's Cas. 1035.

15 Collyer v. Moulton (1868), 9 R. I. 90, 98 Am. Dec. 370; Eagle Mfg. Co. v. Jennings, *supra.*

16 See Thompson v. Percival, *supra;* Lyth v. Ault (1852), 7 Exch. 669, Burd. Cas. 385, Gilm. Cas. 336; Ludington v. Bell (1879), 77 N. Y. 138, 33 Am. Rep. 601; Motley v. Wickoff (1897), 113 Mich. 231, 71 N. W. 520, Burd. Cas. 293, Gilm. Cas. 337; Grubbe v. Pierce (1914), 156 Wis. 29, 145 N. W. 207, 37 Ann. Cas. 1199, 51 L. R. A. (N. S.) 358.

17 As by statute in several states. See Eagle Mfg. Co. v. Jennings, *supra;* Early v. Burt (1886), 68 Iowa 716, 28 N. W. 35.

CHAPTER XIX.

OF THE SO-CALLED LIEN OF PARTNERS.

§ 430. In general.—Something has been already said regarding the right of each partner to insist that the partnership assets shall be applied to the payment of the partnership debts; and it has been noticed that the right is often spoken of as the partner's lien.[1] Before taking up the subject of the application of the assets and the final accounting, a little further consideration of this subject seems desirable. In dealing with this matter, the language of Mr. Justice Lindley will be largely adopted.[2]

§ 431. Nature of the right.—In order to discharge himself from his liabilities as a partner, every partner has a right to have the property of the partnership applied in payment of the partnership debts. In order, also, to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his copartners, as members thereof, deducted from what otherwise would be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have a sort of equitable lien on the partnership property for the purpose of having it applied in payment of the partnership debts; and also a similar lien upon the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners, to the firm.[3]

1 See *ante*, § 184.

2 See 1 Lindley on Partnership (Ewell's 2d ed.), 352 *et seq.*

3 See 1 Lindley, *supra;* Pearson v. Keedy (1845), 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Bardwell v.

§ 432. Same subject — When it becomes important. — This "right, lien, *quasi* lien, or whatever else it may be called," to use Mr. Justice Lindley's expression, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained; nor has any partner thereby, as has been seen,[4] a right to insist that firm creditors shall exhaust the firm assets before having recourse to the partners as individuals. But when partnership accounts have to be taken, or the shares of the partners have to be ascertained, the lien of the partners on the firm assets and on each other's shares becomes of the greatest importance. If, for example, a partner attempts to transfer, or his separate creditors attempt to seize, his interest in the partnership property, the right of the other partners to insist that nothing shall be withdrawn for this purpose until after the partnership claims are satisfied, is obviously of consequence. In many cases it is said that the rights of partnership creditors are to be worked out through the liens of the partners.[5] Nevertheless, a proper conception of the partnership tenure and of the nature of each partner's interest in the partnership property, renders the development of the partner's lien superfluous.

The Uniform Partnership Act quite fully recognizes this view.[6]

§ 433. To what the lien attaches.—During the continuance of the partnership the lien attaches to everything which can be considered partnership property. It is not lost by substitution of new stock for old, and on the death or bankruptcy of a partner his lien continues in favor of those who represent him until his share has been ascertained and provided for by the other partners. After the partnership has been dissolved, however, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by those who continue to carry on the business.

Perry (1847), 19 Vt. 292, 47 Am. Dec. 687.

4 See *ante*, § 314.

5 See *e. g.*, Case v. Beauregard (1878), 99 U. S. 119, 25 L. ed. 370, Mechem's Cas. 596, Ames' Cas. 246, Gilm. Cas. 226.

6 Sec. 25.

As the lien extends only to that which is firm property, if the partnership be one in the profits only, the lien can attach to the profits alone and not to the means by which those profits were produced.[7] And as it is an incident of partnership, it does not exist where there is really no partnership but only a joint adventure, in respect of which each retains the title to his own goods and their proceeds.[8]

§ 434. Against whom lien exists.—The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them.[9] It is available, therefore, against their executors, execution creditors and assignees or trustees in bankruptcy.[10] While, however, it exists against the share of each partner and against a person who purchases that share from him, it would defeat the purposes of the partnership to enforce it against the purchaser of firm property in the ordinary course of business; and a person, therefore, who in good faith and for value purchases from one partner in the course of the business specific chattels belonging to the firm, acquires a good title thereto notwithstanding the liens which the other partners might have had prior to the sale.[11]

§ 435. What the lien secures.—The lien of the partners is intended to secure whatever is due to or from the firm by or to the members thereof as such.[12] It does not extend to debts incurred between the firm and its members otherwise than in their capacity as partners, and in case of the bankruptcy of a partner his assignees may claim his share without regard to such a debt;

7 See *ante*, § 82.

8 1 Lindley, 353 (Ewell's 2d. ed.).

9 1 Lindley, 354 (Ewell's 2d ed.).

10 See Kirby v. Schoonmaker (1848), 3 Barb. Ch. (N. Y.) 46, 49 Am. Dec. 160.

11 See 1 Lindley, *ubi supra*.

12 For example, it secures the repayment of one partner's advances to the firm, as against the other partner's transferees or attaching creditors who seek to reach his interest: Divine v. Mitchum (1844), 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241, Mechem's Cas. 626. Or reimbursement for firm credit extended to one partner as against a mortgagee of his interest, Warren v. Taylor (1877), 60 Ala. 218, Mechem's Cas. 1081, Burd. Cas. 580, Gilm. Cas. 446.

as, for example, a debt for money borrowed by one partner from another for a purely private purpose of his own.[13]

§ 436. How lien is lost.—The partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner, or into the property of a stranger with the other partner's consent. If, therefore, on dissolution the property of the firm is divided between the partners upon the understanding that the debts shall be paid in some specified way, the lien, so far as the partners themselves are concerned, is gone and the partners cannot reclaim the property, although the debts remain unpaid.[14] So where one partner sells out all of his interest in the firm to his copartner, and the latter agrees to pay the debts of the partnership, the lien of the selling partner is, in many cases, held to be gone, and, as an incident, as will be seen,[15] the rights of the firm creditors to priority of payment out of the assets, which is a right worked out through the right of the partner,[16] is held to be gone also.[17] This subject, however, will be more fully considered in the following chapter.

§ 437. No lien if partnership illegal.—If the partnership is illegal, its members have no lien upon their common property or upon each other's shares therein, unless it be by virtue of some agreement not affected by the illegality.[18]

13 See 1 Lindley 354 (Ewell's 2d ed.). Surviving partner has no lien on share of deceased partner for a private debt: Moffatt v. Thompson (1852), 5 Rich. (S. Car.) Eq. 155, 57 Am. Dec. 737. Lien secures partnership matters, but not the general balance of a mixed account. Nichol v. Stewart (1880), 36 Ark. 612.

14 See 1 Lindley, 355 (Ewell's 2d ed.); Miller v. Estill (1856), 5 Ohio St. 508, 67 Am. Dec. 305; Smith v. Edwards (1846), 7 Humph. (Tenn.) 106, 46 Am. Dec. 71, Mechem's Cas. 563; Croone v. Bivens (1859), 39 Tenn. (2 Head) 339, Mechem's Cas. 565; Parker v. Merritt (1883), 105 Ill. 293; Vosper v. Kramer (1879), 31 N. J. Eq. 420; *Ex parte* Ruffin (1801), 6 Vesey 119, Mechem's Cas. 1038, Ames' Cas. 192, Burd. Cas. 192, Gilm. Cas. 217.

15 See *post*, § 446.

16 See *ante*, § 186.

17 See Miller v. Estill, *supra;* Ladd v. Griswold (1847), 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; Reddington v. Franey (1905), 124 Wis. 590, 102 N. W. 1065. But see more fully, *post*, § 446 *et seq.*

18 1 Lindley 355 (Ewell's 2d ed.).

CHAPTER XX.

OF THE APPLICATION OF THE PARTNERSHIP AND INDIVIDUAL ASSETS TO THE CLAIMS OF CREDITORS.

§ 438. In general.—The question of the proper application and distribution of the partnership assets has given rise to no little difficulty and conflict of decision. The chief sources of

difficulty have been disputes between the creditors of the partnership and the creditors of the individual partners. May the creditors of the individual partners obtain, in any way, the application of partnership funds to their claims? May partnership creditors, whose claims are not satisfied out of the partnership property, have recourse to the individual property of the partner, and in such case may they share equally with individual creditors or must they be postponed until individual creditors are paid? These and similar questions indicate the difficulties which arise.

§ 439. What principles control.—At the foundation of the matter lies the rule, already noticed,[1] which must constantly be kept in mind. The capital or property of the firm has been contributed for partnership purposes, and it is part of the implied, if not the express, understanding between the partners, that the partnership property shall primarily be used only for partnership purposes, *e. g.*, to pay partnership debts. Each partner has therefore the right to insist that the partnership property shall be so applied. This right is primarily the right of the partners as between themselves; but it has sometimes been regarded, not as the right of the partners alone, but, in some way, as the right of the partnership creditors, and many cases have been decided upon this assumption. If it is a right of the partners only, it is one which they may waive if they see fit to do so; but if it is a right of the creditors, then it is not one which the partners may waive.

The question may present a different aspect if it arises I, while the partnership is still going on or is being wound up by the partners themselves, than it will if it arises II, after the partnership has been dissolved and the affairs are being wound up under judicial direction; and we will therefore separately consider each phase.

Before doing so, however, it may be well to recall to mind what the partnership creditors may themselves legally do to secure the application of the partnership assets to the payment of their claims.

1 See *ante*, §§ 184-186.

§ 440. I. Application of the assets of a partnership by the partnership creditors.—The partnership creditors, as has been already seen, have no direct lien upon the partnership assets, unless they acquire one expressly by a mortgage or other similar act. In this respect they stand in the same situation as the creditors of an individual. They may be able to induce the partners to give them a direct lien; if they cannot, they can only avail themselves of such legal remedies as the law may give them for the enforcement of their claims. These are of two general sorts: I. In pursuance of some statute, they may be able to force the debtors into bankruptcy or insolvency proceedings, in the course of which they may secure the application of the partnership assets to their claims. The present national bankruptcy act, for example, provides for declaring a partnership bankrupt and administering its assets for the benefit of creditors.[2] In some States insolvency proceedings may be instituted. II. In other cases, the ordinary process by suit, judgment and execution,—supplemented, where the statute provides for it, by proceedings in attachment,—may be resorted to by creditors. While, as has been seen,[3] partners are usually joint debtors, an execution for a partnership debt may usually be levied, as has also been seen,[4] upon either partnership or individual property. Individual creditors may resort to the individual property, or to the partner's residuary interest[5] in the partnership property. While a prior levy by a partnership creditor upon individual property will usually take precedence over a subsequent levy by an individual creditor, a prior levy by an individual creditor upon a partner's interest in the partnership property operates in subordination to the demands of partnership creditors upon that property.[6]

Legal liens so acquired, as will be seen,[7] are not usually disturbed by later judicial proceedings, unless they amount to a preference forbidden by some statute authorizing them.

[2] Sec. 5. Appendix.
[3] See *ante*, § 308.
[4] See *ante*, § 314.
[5] See *ante*, § 145 *et seq.*
[6] See *ante*, §§ 146-148.
[7] See *post*, § 463.

§ 441. II. Application of the assets of a partnership by the partners themselves.—While the affairs of the partnership are still going on and its property and business are still in the hands of the partners themselves, it is, in general, true that they may make such disposition of the property as they see fit. It has sometimes been said that the partnership creditors have a kind of lien upon the partnership assets, but this is not true. It is the property of the partners, which they may, in general, deal with as they please, provided they make no disposition of it which will be deemed to be in fraud of creditors.[8] Thus they may sell it, mortgage it, or turn it out in payment of their partnership debts. They may assign all the partnership property for the benefit of the partnership creditors. They may apply it upon all partnership debts *pro rata,* or, in the absence of a statute forbidding it, they may prefer one partnership creditor to another. They may unite in selling all the partnership property to one who buys in good faith and for value; and the purchaser will get a good title, even though the partnership was insolvent and the partners had a secret intent to defraud their creditors or afterwards did in fact misapply the proceeds. In all of these cases the partners are actually or ostensibly using the partnership property for partnership purposes.

§ 442. —— Right to pay joint but not partnership debts out of partnership assets.—When, however, the partners attempt to apply the partnership assets to the payment of any other than a partnership debt, different considerations present them-

[8] Thus in Reyburn v. Mitchell (1891), 106 Mo. 365, 16 S. W. 592, 27 Am. St. R. 350, the court, quoting from Sexton v. Anderson, 95 Mo. 381, says: "The partners may, so long as the firm exists, do with their property as they see fit. The firm creditors have no lien on the partnership property for the payment of their debts while the firm continues to exist. Partners have a right to have the partnership property applied to partnership purposes, but this is a right or lien which they may waive. Hence the great majority of adjudicated cases are to this effect: that all the partners may, by their joint act, dispose of partnership property in liquidation and payment of a debt owing by an individual member of the firm. The qualification is that the transaction must be in good faith, and not for fraudulent purposes."

selves. The first question will be whether it is a conveyance in fraud of creditors. Since the Statute of 13 Elizabeth, c. 5 (A. D. 1570) at least, all gifts, grants, conveyances, etc., devised to the intent to delay, hinder or defraud creditors and others of their just and lawful actions, etc., are, in our law, held to be void as to such creditors. Conveyances, etc., made upon good consideration and *bona fide* are not within this rule. Under this rule it is fraudulent for a debtor to give away his property, dispose of it for other than a good consideration, or use it to pay debts which he does not himself owe, if, to do so, will hinder or delay his creditors in securing their pay out of his property. To fairly use all his property to pay one or part of his debts is, however, not at common law fraudulent, even though the result is that there is nothing left to pay others. The common law permitted the debtor to prefer one creditor to another. To give away something, etc., was not fraudulent, if the debtor fairly reserved enough to pay his debts. All of these rules apply to partners, but how?

May the partners lawfully use the partnership property to pay a joint debt of the partners which is not a partnership debt, leaving the partnership debts unpaid? If the partnership were a legal entity this might not be done.[9] The entity would be using its property to pay debts it did not owe. It would be equivalent to a gift. A corporation, for example, may not lawfully use the corporate property to pay the individual debts of the corporators, leaving the corporate debts unpaid. But the partnership is not usually regarded as an entity; so that this does not settle the question. By the hypothesis, it is a debt which they all owe; but they do not owe it as partners. The partnership assets are contributed for partnership purposes. Each partner has a so-called lien which would prevent their being applied otherwise. But here no one asserts that lien; all are willing to waive it; all, by the hypothesis, consent that the partnership assets shall be applied to the payment of this debt. Who else can object? The partnership creditors have no lien. Their rights, it is said, must be worked out through the lien of

[9] See *e. g.*, Richards v. Le Veille (1895), 44 Neb. 38, 62 N. W. 304, Burd. Cas. 281, which is put upon this ground.

the partners. But this, by the hypothesis, has been waived by the partners themselves. May it thus be waived at the expense of the partnership creditors? It is said in some cases that such a disposition of the partnership property is not fraudulent as to the partnership creditors.[10] The better reason, it is believed, condemns it. As against the partnership creditors the partnership assets should not be capable of a transfer except for a partnership debt or a consideration moving to the partnership.[11] The proposed Uniform Fraudulent Conveyance Act expressly adopts this view.[12]

A theory analogous to the so-called "trust-fund theory" which has been much resorted to in dealing with the application of the assets of corporations, might be made available here, namely, that the assets of a partnership are a species of trust fund, not

10 Thus in Saunders v. Reilly (1887), 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, Burd. Cas. 277, the court say: "All members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash, they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property." To same effect: Citizens' Bank v. Williams (1891), 128 N. Y. 77, 28 N. E. 33, 26 Am. St. R. 454, Mechem's Cas. 1050, Gilm. Cas. 289.

11 See Whelan v. Shain (1896), 115 Cal. 326, 47 Pac. 57, Burd. Cas. 283, Gilm. Cas. 288.

12 Sec. 8. [Conveyance of Partnership Property.] Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred—

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without a fair consideration to the partnership as distinguished from consideration to the individual partners.

The same statute, Sec. 2 (2), provides that "In determining whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription."

applicable to other purposes until all partnership purposes, including the payment of the partnership debts, have been satisfied.

§ 443. ——**Right to pay individual debts of all of the partners.**—A somewhat similar question is presented where the partners attempt to use the partnership property to pay the individual debts of the partners severally. It could not lawfully be done by one partner without the other's consent. The partner's so-called lien would prevent that. For the other to give his consent without any corresponding advantage to himself would be equivalent to a gift of his interest in the property so used, and therefore objectionable. But suppose each partner wished to pay his individual debt out of the partnership property, and the debts in question bore a substantial relation to each partner's interest in the property. Their mutual release of their liens would furnish a good consideration. The debts, by the hypothesis, are valid debts, and it is usually most commendable to pay them. The debtor, at common law, may prefer one creditor to another. It seems quite unobjectionable, then, to use the partnership property to pay these debts rather than the partnership debts, unless there is something in the fact that the latter are partnership debts which should give them priority. The entity theory, again, would prevent such a use of the partnership property. So would such a trust-fund theory as has been suggested. A number of cases have held such a use permissible.[18] A number have held the contrary. Here, also, it

18 In Goddard-Peck Grocery Co. v. McCune (1894), 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681, Mechem's Cas. 613, the court says: "No principle of law is better settled than that, in the administration of an insolvent partnership estate, the assets of the firm must be applied to the satisfaction of the firm creditors to the exclusion of the creditors of the individual partners. Hundley v. Farris, 103 Mo. 78, 12 L. R. A. 254; First Nat. Bank v. Brenneisen, 97 Mo. 148, and cases cited in each. The principle we think equally well settled by the more recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith. Sexton v. Anderson, 95 Mo. 380; Rey-

is believed that right theory forbids such an application of the partnership assets, and that their transfer should only be permitted, so far as partnership creditors are concerned, where the consideration moves to the partnership.[14] The Uniform Fraud-

burn v. Mitchell, 106 Mo. 365 (*supra*), and cases cited in each; Seger's Sons v. Thomas Bros., 107 Mo. 635. As Phelps v. McNeely, 66 Mo. 555, 27 Am. Rep. 378, is in conflict with the cases last cited and the great weight of authority, it should not be followed and is overruled.''

In Fisher v. Syfers (1887), 109 Ind. 514, 10 N. E. 306, it is said: ''The rule that obtains in the distribution of the estate of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners respectively. Partnership creditors have no lien upon partnership property; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners. Warren v. Farmer, 100 Ind. 593; Trentman v. Swartzell, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit; each has the right to waive his equitable lien, and together they may sell, assign or mortgage the property of the firm to pay or secure either an individual debt of one of the partners, or the debts of the firm.''

See, also, Purple v. Farrington (1889), 119 Ind. 164, 25 N. E. Rep. 904, 4 L. R. A. 535; Ellison v. Lucas (1891), 87 Ga. 223, 13 S. E. 445, 27 Am. St. R. 242; Smith v. Smith (1893), 87 Iowa 93, 54 N. W. 73, 43 Am. St. R. 359; First Nat. Bank v. Brubaker (1905), 128 Iowa 587, 105 N. W. 116, 2 L. R. A. (N. S.) 256, 111 Am. St. R. 209; Kincaid v. Wall Paper Co. (1901), 63 Kan. 288, 65 Pac. 247, 88 Am. St. R. 243, 54 L. R. A. 412; Armstrong v. Carr (1895), 116 N. Car. 499, 21 S. E. 175; Reynolds v. Johnson (1891), 54 Ark. 449, 16 S. W. 124; Sargent v. Blake (1908), 87 C. C. A. 213, 160 Fed. 57, 15 Ann. Cas. 58, 17 L. R. A. (N. S.) 1040; Wiggins v. Blackshear (1894), 86 Tex. 665, 26 S. W. 939, Burd. Cas. 198; Stahl v. Osmers (1897), 31 Oreg. 199, 49 Pac. 958, Mechem's Cas. 579, Burd. Cas. 237. Compare Teague v. Lindsey (1894), 106 Ala. 266, 17 So. 538.

14 See Jackson Bank v. Durfey (1895), 72 Miss. 971, 18 So. 456, 48 Am. St. R. 596, 31 L. R. A. 470, Mechem's Cas. 619, Burd. Cas. 201; Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 567, Ames' Cas. 229, Burd. Cas. 222, Gilm. Cas. 251; Bannister v. Miller (1895), 54 N. J. Eq. 121, 701, 32 Atl. 1066, Burd. Cas. 207.

ulent Conveyance Act adopts this view.[15] If the only persons interested are the partners themselves, any arrangement satisfactory to them would ordinarily be unobjectionable.

§ 444. ——**Right to assume or pay individual debt of one partner.**—Whether, however, the partners may apply the partnership property in payment of the individual debt of one of the partners where no consideration moves to the others has been much disputed. It is conceded that they may do this if they reserve enough to satisfy the partnership creditors;[16] but where the partnership is already insolvent, or where such an application will leave it insolvent and unable to pay the partnership debts, there is controversy.

It is held, on the one hand, that if the firm is then insolvent, or if such an application of their assets will make them insolvent, it would be fraud upon the partnership creditors to permit such an application, and it will therefore not be allowed.[17]

15 See Sec. 8, quoted in note to preceding section.

16 See Schmidlapp v. Currie (1878), 55 Miss. 597, 30 Am. Rep. 530; Hage v. Campbell (1891), 78 Wis. 572, 47 N. W. 179, 23 Am. St. R. 422, Mechem's Cas. 609; Woodmansie v. Holcomb (1885), 34 Kan. 35, 7 Pac. 603; Jewett v. Meech (1884), 101 Ind. 289.

17 See Ransom v. Vandeventer (1863), 41 Barb. (N. Y.) 307; Wilson v. Robertson (1860), 21 N. Y. 587; Bartlett v. Meyer-Schmidt Grocery Co. (1898), 65 Ark. 290, 45 S. W. 1063, Mechem's Cas. 1062; Hage v. Campbell, *supra;* Menagh v. Whitwell (1873), 52 N. Y. 146, 11 Am. Rep. 683, Mechem's Cas. 567, Ames' Cas. 229, Burd. Cas. 221, Gilm. Cas. 251; Bulger v. Rosa (1890), 119 N. Y. 459, 24 N. E. 853; Kurner v. O'Neil (1894), 39 W. Va. 515, 20 S. E. 589; Hill v. Draper (1894), 58 Ark. 625, 24 S. W. 1075.

In Arnold v. Hagerman (1888), 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. R. 712, Mechem's Cas. 602, Gilm. Cas. 223, the court, adopting the language of Clements v. Jessup (1883), 36 N. J. Eq. 569, says: "Partnership creditors, in equity, have an inherent priority of claim upon partnership property over individual creditors; and a transfer of partnership property by one partner, with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts."

The indorsement of a note in the firm name to secure the liability of one of the partners when the firm is insolvent is not fraudulent as

It is contended, on the other hand, that if done while the partners are still in control of their business, they may make such an appplication, if they act in good faith, though they were already or thereby became insolvent.[18]

The latter view seems indefensible in point of theory, as it amounts practically to a gift by the partners not benefited to their copartner. The Uniform Fraudulent Conveyance Act condemns it.[19]

§ 445. —— **Right of partner to apply individual assets to firm debts.**—Whether one partner will be permitted to apply his individual assets to the payment of the firm creditors and thereby exclude his own separate creditors, as by making an assignment for their benefit or giving them the preference in assigning his estate, is a question upon which the authorities are in some conflict. It is said, on the one hand, that inasmuch as the firm creditors are equally creditors of the partners as individuals, there is no reason why the individual partner, so long as he has control of his own assets, should not pay the firm debts out of his own estate if he so prefers.[20] On the other hand, it is

against firm creditors, provided it is done for an honest purpose, in which the firm was interested and with the consent of the members of the firm, and the indorsee did not know that the firm was insolvent. Bernheimer v. Rindskopf (1889), 116 N. Y. 428, 22 N. E. 1074, 15 Am. St. R. 414.

Where a firm, composed of two former partners and an incoming partner, at the time of formation assume a debt of the former firm, it may properly be paid out of the firm assets, though the firm is insolvent. Peyser v. Myers (1892), 135 N. Y. 599, 32 N. E. 699.

18 See Sigler v. Knox County Bank (1858), 8 Ohio St. 511; Pepper v. Peck (1890), 17 R. I. 55, 20 Atl. 16; Anderdson v. Norton (1885), 83 Tenn. 14, 54 Am. Rep. 400; Huiskamp v. Moline Wagon Co. (1886), 121 U. S. 310, 7 Sup. Ct. 899, 30 L. ed. 971; Coffin v. Day (1888), 34 Fed. 687; Sargent v. Blake (1908), 87 C. C. A. 213, 160 Fed. 57, 15 Ann. Cas. 58, 17 L. R. A. (N. S.) 1040.

19 See Sec. 8, quoted in note to second section preceding.

20 See Gallagher's Appeal (1886), 114 Pa. 353, 7 Atl. 237, 60 Am. R. 350, 4 Sad. 297; Newman v. Bagley (1835), 16 Pick. (Mass.) 570, Burd. Cas. 285; Gadsden v. Carson (1857), 9 Rich. Eq. (S. C.) 252; Chesher v. Clamp (1895), 10 Tex. Civ. App. 350, 30 S. W. 466.

Where the partner is actually in-

urged that the separate creditors have a first claim upon the separate assets, and to permit them to be diverted to the payment of the firm creditors is a fraud upon the separate creditors.[21] The former would seem to be the better view.

§ 446. —— Right of partners to convert firm property into individual property.—Intimately connected with the questions already considered is that of the right of the partners, by any arrangement among themselves, to so divest themselves of their own "lien" upon the partnership property that the right of the firm creditors to priority of payment out of that property—which right, as has been seen, is commonly said to depend upon the partners' right—shall be cut off.[22] Thus, for example, may the partners divide the partnership property among themselves and then use it to pay their separate rather than their partnership creditors? May one partner on retiring from the firm sell out all of his interest in the partnership assets to his copartner, who continues the business, in such a way that the latter may thereafter apply those assets to the payment of his individual debts to the exclusion of the firm creditors? May both partners by selling to a third person thus divest their firm creditors of their priorities in the property so sold?

These questions are but another form of that already considered, namely, the right of the partners to apply firm assets to

debted to the partnership, a *bona fide* transfer of his separate estate to the firm in payment or security of that debt, cannot be impeached by his separate creditors: Winslow v. Wallace (1888), 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179, Mechem's Cas. 658. (Here they were subsequent creditors, also.)

21 See Holton v. Holton (1860), 40 N. H. 77, Ames' Cas. 332; Jackson v. Cornell (1844), 1 Sandf. (N. Y.) Ch. 348.

22 See *ante*, § 436. There is obviously much less danger of loss to the partnership creditors where the partners or some of them retain the title to the partnership property, than where they convey it to some one else. While they or any of them hold it, it is just as much open to seizure on execution by the partnership creditors as individual property as it would be if partnership property. It is when they attempt to mortgage, assign or transfer it as individual property that the partnership creditor is chiefly endangered.

the payment of individual debts.[23] They rest upon substantially the same considerations and present substantially the same conflict of opinion. That solvent partners, acting in good faith, may do so, seems to be conceded.[24] That it may also be done, though the partners are not solvent, if done in good faith and for an adequate consideration moving to the partnership, would doubtless be held. That it may be done under similar circumstances even though the consideration moves to the partners individually has also been held,[25] though this view is believed to be entirely unsound wherever it substantially hinders, delays or defeats the partnership creditors.[26]

§ 447. ——Whether the mere assumption of the debts by the continuing partner is a sufficient consideration has at times been in question. In one case [27] it is said: "It is clear that while the partnership is solvent and going on, the partners may, by

[23] See *ante*, § 444.

[24] See *Ex parte* Ruffin (1801), 6 Ves. 119, Mechem's Cas. 1038, Ames' Cas. 192, Burd. Cas. 192, Gilm. Cas. 217; Dimon v. Hazard (1865), 32 N. Y. 65, Mechem's Cas. 1043; Fulton v. Hughes (1885), 63 Miss. 61; Stanton v. Westover (1886), 101 N. Y. 265, 4 N. E. 529; Ketchum v. Durkee (1846), 1 Barb. (N. Y.) Ch. 480, 45 Am. Dec. 412; Reese v. Bradford (1848), 13 Ala. 837; *In re* Denning (1902), 114 Fed. 219.

[25] See Allen v. Center Valley Co. (1851), 21 Conn. 130, 54 Am. Dec. 333; Howe v. Lawrence (1852), 9 Cush. (Mass.) 553, 57 Am. Dec. 68, Ames' Cas. 213; Lee v. Bradley Fertilizer Co. (1902), 44 Fla. 787, 33 So. 456; *In re* Suprenant (1914), 217 Fed. 470.

The right of the partners to divide the partnership property among themselves with a view to then claiming individual exemptions in it, has been sustained in a number of cases: Lee v. Bradley Fertilizer Co., *supra;* Bates v. Callender (1883), 3 Dak. 256, 16 N. W. 506; Harris v. Visscher (1876), 57 Ga. 229; Goudy v. Werbe (1888), 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Worman v. Giddey (1874), 30 Mich. 151; Watson v. McKinnon (1889), 73 Tex. 210, 11 S. W. 197; O'Gorman v. Fink (1883), 57 Wis. 649, 15 N. W. 771, 46 Am. R. 58.

[26] See *In re* Denning (1902), 114 Fed. 219; *In re* Dillon (1900), 100 Fed. 627; Smith v. Heineman (1897), 118 Ala. 195, 24 So. 364, 72 Am. St. R. 150.

[27] Darby v. Gilligan (1889), 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740, Gilm. Cas. 221, citing many cases. See, also, Millhiser v. McKinley (1900), 98 Va. 207, 35 S. E. 446. Denied in Sargent v. Blake (1908), 87 C. C. A. 213, 160 Fed. 57, 15 Ann. Cas. 58, 17 L. R. A. (N. S.) 1040.

unanimous assent or joint act, do what they please with the assets, if the act is *bona fide*. Where, in such case, one partner sells or assigns his interest to the other, *bona fide,* for a valuable consideration, or an agreement to pay the debts of the firm, and indemnify against them, this will change the joint into a separate property. The only question is upon the *bona fides* of the transaction. If such an arrangement could not be made, a partner could never retire. On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the firm creditors."

The proposed Uniform Fraudulent Conveyance Act,[28] as has been seen, will remove many of the doubts. It provides that "every conveyance of partnership property, and every partnership obligation incurred, when the partnership is or will be thereby rendered insolvent is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred—

(*a*) To a partner, whether with or without a promise by him to pay partnership debts, or

(*b*) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners."

§ 448. —— Another view of similar transactions leading to the same result is that where there is an express stipulation that the continuing partner shall pay the debts this operates not to release but to continue the selling partner's lien upon the assets, unless expressly waived, and therefore the firm creditors may

[28] Sec. 8.

still work out their priority through his lien, until the property has come into the hands of a *bona fide* purchaser.[29]

§ 449. III. Application of assets when distributed by court—Firm creditors first paid out of firm assets.—When, however, the management of the partnership assets is taken out of the hands of the partners—who have made no valid previous disposition of them [30]—and put under the control of the court, as in case of dissolution, bankruptcy proceedings, the settlement of insolvent estates in courts of equity, or the like, a different rule prevails. Acting here upon the presumed intention and desire of each partner that the partnership assets shall be applied to the discharge of the partnership liabilities, the courts apply them first to that purpose, and exclude the individual creditors

[29] See Bulger v. Rosa (1890), 119 N. Y. 459, 24 N. E. 853; Olson v. Morrison (1874), 29 Mich. 395; Thayer v. Humphrey (1895), 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. R. 887, Burd. Cas. 117, Gilm. Cas. 546.

[30] Thus, in Case v. Beauregard (1878), 99 U. S. 119, 25 L. ed. 370, Mechem's Cas. 596, Ames' Cas. 246, Gilm. Cas. 226, it is said: "The right of each partner extends only to the share of what may remain after payment of the debts of the firm and a settlement of its accounts. Growing out of the right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity that partners have between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have the privilege or preference, sometimes loosely denominated a 'lien,' to have the debts due to them paid out of the assets of a firm in course of liquidation to the exclusion of the creditors of its several members. This equity is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54; York County Bank's Appeal, 32 Pa. St. 446. But so long as the equity of the partner remains in him—so long as he retains an interest in the firm assets as a partner—a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce through it the application of those assets primarily to the payment of the debts due them whenever the property comes under its administration."

of the partners from participation until the partnership creditors are paid. The Federal Bankruptcy Act adopts this rule, in explicit terms,[31] and so also does the Uniform Partnership Act.[32]

So where firm property has been levied upon for the individual debt of one partner, inasmuch as the only interest which can ordinarily be so sold is the partner's share in the final surplus,[33] such levy must yield priority to subsequent levies for debts due to the partnership creditors.[34] And the same result will ensue where one partner has mortgaged or otherwise incumbered his interest in the partnership property to secure his separate creditors.[35]

But where all of the partners themselves, while the assets remained under their control, have created valid liens upon the property, the court in administering the estate will give such liens effect.[36]

§ 450. Same subject—Joint but not partnership creditors not preferred.—The reasons which operate to give firm creditors

31 Sec. 5, subd. *f*, "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual parties in the proportion of their respective interests in the partnership."

32 Sec. 40, subd. *h*. "When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property, and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore."

33 See *ante*, § 148.

34 Jarvis v. Brooks (1853), 27 N. H. 37, 59 Am. Dec. 359; Conroy v. Woods (1859), 13 Cal. 626, 73 Am. Dec. 605; Bullock v. Hubbard (1863), 23 Cal. 495, 83 Am. Dec. 130; Pierce v. Jackson (1810), 6 Mass. 242, Ames' Cas. 293; Meech v. Allen (1858), 17 N. Y. 300, 72 Am. Dec. 465, Mechem's Cas. 677, Ames' Cas. 326, Gilm. Cas. 499.

35 Ewart v. Mercantile Co. (1895), 130 Mo. 112, 31 S. W. 1041.

36 Smith v. Smith (1893), 87 Iowa 93, 54 N. W. 73, 43 Am. St. R. 359.

as such a preference in payment out of firm assets operate to exclude from such priority any who do not stand in that relation. It is consequently generally held in this country that the joint creditors of the partners as individuals, not being partnership creditors, will, in a judicial distribution, be excluded from participation in the partnership assets until the firm creditors are paid.[37] The English courts have held the contrary.[38]

A number of American courts have held the contrary where the question arose in controversies as to the right of partnership creditors to priority over an earlier levy by a creditor of all the partners jointly, though not a partnership creditor.[39]

The rule in bankruptcy excludes the joint non-partnership creditor in favor of the partnership creditor.[40]

As has been already seen, an obligation may be shown to be a partnership obligation in fact—and hence entitled to be paid out of partnership assets—although it was made in the individual names of the partners instead of the firm name.[41]

§ 451. Same subject—Partner cannot compete with firm creditors.—So, if the partnership be indebted to one partner, inasmuch as he is himself, as a member of the partnership, one of the persons from whom his claim is due, and is therefore at once both debtor and creditor, while as to the claims of strangers against the partnership he is a debtor simply, it is clear that he is not strictly a partnership creditor within the rule which

[37] See Forsyth v. Woods (1870), 11 Wall. (U. S.) 484; Second Nat. Bank v. Burt (1883), 93 N. Y. 233; Turner v. Jaycox (1869), 40 N. Y. 470; Whelan v. Shain (1896), 115 Cal. 326, 47 Pac. 57; Dunnica v. Clinkscales (1881), 73 Mo. 500.

Where there is but one partnership, though it has several branches, all of the assets are to be administered as a unit: *In re* Vetterlein (1890), 44 Fed. 57. Otherwise, where there were really distinct partnerships; Gay v. Ray (1907), 195 Mass. 8, 80 N. E. 693; *post*, § 461.

[38] See Hoare v. Oriental Bank (1877), L. R. 2 App. Cas. 589.

[39] See Saunders v. Reilly (1887), 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, Burd. Cas. 277; Steiner v. Peters Store Co. (1898), 119 Ala. 371, 24 So. 576; Couchman v. Maupin (1879), 78 Ky. 33.

[40] See *In re* Nims (1879), 16 Blatchf. 439; *In re* Weisenberg (1904), 131 Fed. 517.

[41] See *ante*, § 295; Rouse v. Wallace (1897), 10 Colo. App. 93, 50 Pac. 366.

gives such creditors priority. It is settled, therefore, that he cannot compete with the latter class in securing payment out of the assets of the partnership;[42] neither can his own creditors, or others standing simply in his shoes,[43] by virtue of his claim, be permitted to so compete.

"To that rule," said Lord Eldon, "there is an exception, manifestly founded in justice, and that is where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership."[44] Another exception to this rule has been made in England where the firm and the partner were carrying on separate trades, and the claim was due in respect of goods furnished by one to the other as such separate traders;[45] but this exception has not been approved in the United States.[46]

Some other exceptions have also been made, as where the claimant partner has been discharged from liability for the partnership debts and therefore is no longer one of the debtors,[47] or his liability has been barred by the statute of limitations,[48] and he has afterward become a creditor of the firm.

[42] See Edison Illuminating Co. v. DeMott (1893), 51 N. J. Eq. 16, 25 Atl. 952; *Ex parte* Blythe (1881), 16 Ch. Div. 620; Bonwit v. Heyman (1895), 43 Neb. 537, 61 N. W. 716; McCruden v. Jonas (1896), 173 Pa. 507, 34 Atl. 224, 51 Am. St. R. 774, Burd. Cas. 478; *In re* Rice (1908), 164 Fed. 509; *In re* Telfer (1910), 106 C. C. A. 366, 184 Fed. 224 (under present bankruptcy act).

[43] McCruden v. Jonas, *supra.* Where the claim is a negotiable instrument, the *bona fide* transferee for value will stand on a better footing. See Millers River Bank v. Jefferson (1884), 138 Mass. 111, Gilm. Cas. 563; McCruden v. Jonas, *supra;* Parsons v. Tillman (1884), 95 Ind. 452; First Nat. Bank v. Wood (1891), 128 N. Y. 35, 27 N. E. 1020.

[44] See *Ex parte* Sillitoe (1824) 1 Glyn v. Jam. 374, Ames' Cas. 428, Gilm. Cas. 569.

[45] See *Ex parte* Sillitoe, *supra; Ex parte* Cook (1831), Montagu, 228, Ames' Cas. 432. As to claims between firms having a common partner, see Haines Estate, (1896), 176 Pa. 354, 35 Atl. 237, Burd. Cas. 482; First Nat. Bank v. Wood, *supra;* Bonwit v. Heyman, *supra.*

[46] See Somerset Potters Works v. Minst (1852), 10 Cush. (64 Mass.) 592; *Re* Lane (1874), 2 Low. (U. S. D. C.) 333.

[47] See *Ex parte* Atkins (1820), 1 Buck 479.

[48] See *In re* Hepburn (1884), 14 Q. B. Div. 394.

§ 452. Same subject—One partner's share cannot be reached by his creditors until partners' claims against firm are satisfied.—So, though the share or interest of one partner in the final surplus may, as has been seen, be rendered available to his creditors, it must be kept in mind that that surplus is not ascertained until not only the firm creditors as such are paid, but also not until the claims of the respective partners against the firm, as for advances made or money loaned to it, are satisfied. In equity, therefore, the individual creditors of one partner cannot reach his share until the claims of partners against the firm have been satisfied.[49]

§ 453. Same subject—Individual creditors usually given priority in individual assets of a partner.—The right of the partnership creditors to priority of payment out of the partnership assets being conceded, it has been urged that the separate creditors of the partner were entitled in a judicial distribution of the assets to a like priority of payment out of the separate assets of the partner, and this right has been maintained by many, perhaps by a majority, of the cases in the United States, following the early English precedents.[50] "The correctness of this rule, however," it was said in a leading case,[51] "has been

49 See Buchan v. Sumner (1847), 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Crooker v. Crooker (1863), 52 Me. 267, 83 Am. Dec. 509; Divine v. Mitchum (1844), 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241, Mechem's Cas. 626; Buck v. Winn (1850), 11 B. Mon. 320; Cain v. Hubble (1919), 184 Ky. 38, 211 S. W. 413; Warren v. Taylor (1877), 60 Ala. 218, Mechem's Cas. 1081, Burd. Cas. 580, Gilm. Cas. 446.

50 See Rodgers v. Meranda (1857), 7 Ohio St. 180, Mechem's Cas. 630, Burd. Cas. 424, Gilm. Cas. 528; Hundley v. Farris (1890), 103 Mo. 78, 15 S. W. 312, 23 Am. St. R. 863, 12 L. R. A. 254; Claflin v. Behr (1889), 89 Ala. 503, 8 So. 45; Moody v. Lucier (1883), 62 N. H. 584; Greene v. Butterworth (1889), 45 N. J. Eq. 738, 17 Atl. 949; Peters v. Bain (1889), 133 U. S. 670, 10 Sup. Ct. 354; New Market Nat. Bank v. Locke (1883), 89 Ind. 428; Hawkins v. Mahoney (1898), 71 Minn. 155, 73 N. W. 720, Gilm. Cas. 558; Davis v. Howell (1880), 32 N. J. Eq. 72, Burd. Cas. 438, Gilm. Cas. 538.

Where one partner who is solvent seeks to recover a private debt from the estate of his insolvent copartner, it is no objection to his doing so that the amount if recovered by him will ultimately go through his estate to the partnership creditors; *In re* Head [1894], 1 Q. B. 638.

51 Rodgers v. Meranda, *supra*.

In Murrill v. Neill (1850), 8 How.

much controverted, and there has not always been a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that, in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively which has been thus benefited by their transactions. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners as well as that

(U. S.) 414, 12 L. ed. 1135, it is said: "The rule in equity governing the administration of insolvent partnerships is one of familiar acceptance and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally if not universally received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: That partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called upon to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule to stay the hand of innovation at this day, at least under any motive less strong than the most urgent propriety."

of the firm; and, also, those who contract with a partner in his separate capacity place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm." The court, however, concluded that the rule was well established, saying: "Some general rule is necessary, and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantage in having different funds to resort to, while the individual creditors have but one." But whether the reasons assigned to the rule are satisfactory or not, the rule itself seems to be established by the clear weight of authority.

It is unqualifiedly adopted by the Federal Bankruptcy Act,[52] and by the Uniform Partnership Act,[53] as has been seen.

§ 454. Same subject—Contrary views.—But notwithstanding the quite general concurrence in the rule giving each class of creditors priority in the respective funds, it has met with some forcible dissent,[54] and upon principle it is difficult to sustain it.

[52] Sec. 5, subd. *f.* quoted *ante,* note 31 § 449.

[53] Sec. 40, subd. *h.* quoted *ante,* note 32 § 449.

[54] See Hutzler v. Phillips (1887), 26 S. C. 136, 1 S. E. 502, 4 Am. St. R. 687; Blair v. Black (1889), 31 S. C. 346, 9 S. E. 1033, 17 Am. St. R. 30, Mechem's Cas. 644; Pettyjohn v. Woodruff (1890), 86 Va. 478, 10 S. E. 715; Freeport Stone Co. v. Carey (1896), 42 W. Va. 276, 26 S. E. 183; Bardwell v. Perry (1847), 19 Vt. 292, 47 Am. Dec. 687; Gueringer v. Creditors (1881), 33 La. Ann. 1279, (see also Miller v. N. O. Fertilizer Co. (1908), 211 U. S. 496, 29 S. Ct. 176); Camp v. Grant

The true rule, from the standpoint of principle, would seem to be that inasmuch as each partner is individually liable for the partnership debts, the creditors of the firm (and therefore of each partner as well) are entitled to share equally with the separate creditors in the separate assets of the partners, at least after exhausting the partnership assets. The basis of this qualification is found in the fact that the partnership creditor has recourse to *two* funds (*i. e.*, the partnership assets and the individual assets), while the individual creditor has recourse to but *one* fund, namely, the individual assets; and it is a principle of equity that where one creditor has access to two funds while another creditor has access to but one, the former shall exhaust the separate fund before resorting to the common fund. Having done so, however, without obtaining payment in full, he may then resort to the other fund.

In Kentucky a modified application of this principle is made whereby when the partnership creditor claims priority in and has secured a percentage of his claim out of the partnership assets, the individual creditor may take a similar percentage out of the individual assets; the residue of the individual assets, if any, will then be distributed *pro rata* among the partnership and the individual creditors.[55]

§ 456. Same subject—How where there are individual but no partnership assets.—But either rule giving the individual creditors a priority in the individual assets, so far as it rests upon equitable considerations, applies only where there are two funds. Thus, where there are individual assets but no partner-

(1851), 21 Conn. 41, 54 Am. Dec. 321; Robinson v. Security Co. (1913), 87 Conn. 268, 87 Atl. 879, Ann. Cas. 1915 C, 1170, to the effect that partnership creditors may share equally with individual creditors in the separate assets.

55 See Northern Bank of Ky. v. Keizer (1865), 2 Duv. (Ky.) 169, Mechem's Cas. 650; Fayette Nat. Bank v. Kenney (1880), 79 Ky. 133, 2 Ky. Law R. 35, Mechem's Cas. 653; Hill v. Cornwall (1894), 95 Ky. 512, 26 S. W. 540, 16 Ky. Law R. 97.

See also Johnson v. Gordon (1897), 102 Ga. 350, 30 S. E. 507, showing that the Kentucky rule had been adopted by the Georgia code. Compare also Bell v. Newman (1819), 5 Serg. & R. 78, since overruled. See discussion in Hawkins v. Mahoney, *supra*.

ship assets and no solvent partner, it has usually been held that the partnership creditors may share equally with the individual creditors in the separate assets of the partner, though there are holdings to the contrary.[56]

Whether the partnership creditors may so share in the individual assets under the provisions of the Federal Bankruptcy Act has been the subject of much dispute, but it has now been authoritatively decided that they may not.[57]

§ 456. Same subject—Firm cannot compete with individual creditors.—Passing next from the right of partnership creditors as such to compete with the individual creditors in the separate estate of one partner, the question arises whether, if that partner was indebted to the partnership, the latter or those who represent it can, in a judicial distribution of the assets, compete with the individual creditors of that partner in the

[56] See *In re* Lloyd (1884), 22 Fed. 88; *In re* West (1889), 39 Fed. 203; Harris v. Peabody (1881), 73 Me. 262, Mechem's Cas. 667, Gilm. Cas. 541; Curtis v. Woodward (1883), 58 Wis. 499, 17 N. W. 328, 46 Am. R. 647; Alexander v. Gorman (1886), 15 R. I. 421, 7 Atl. 243. *Contra*, Howe v. Lawrence (1852), 9 Cush. (Mass.) 553, 57 Am. Dec. 68, Ames' Cas. 213; Warren v. Farmer (1884), 100 Ind. 593; *In re* Gray (1888), 111 N. Y. 404; 18 N. E. 719; Stewart's Case (1857), 4 Abb. Pr. (N. Y.) 408, Burd. Cas. 493; *In re* Dauchy (1902), 169 N. Y. 460, 62 N. E. 573. See the case where the individual creditor resorted to unusual methods to create a joint fund: *In re* Marwick (1845), 2 Ware 233, Mechem's Cas. 672, Burd. Cas. 445, Gilm. Cas. 545.

Secured Creditor — A creditor, who also has security for the claim, may, in equity, by what seems the weight of authority, prove for the entire amount of his claim, and not simply for the amount after deducting the value of the security—though, of course, he can not retain more than the full amount of his claim from all sources; in bankruptcy, on the other hand, he must deduct the value of his security. See Merrill v. National Bank (1898), 173 U. S. 131, 19 Sup. Ct. 360, 43 L. ed. 640; Aldrich v. Chemical Nat. Bank (1900), 176 U. S. 618, 20 Sup. Ct. 498, 44 L. ed. 611; Tebbetts v. Rollins (1906), 192 Mass. 169, 78 N. E. 299; Bank Commissioners v. Trust Co. (1901), 70 N. H. 536, 49 Atl. 113; People v. Remington (1890), 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458, Burd. Cas. 442; Allen v. Danielson (1887), 15 R. I. 480, 8 Atl. 705, Gilm. Cas. 564.

[57] See Farmers Bank v. Ridge Ave. Bank (1915), 240 U. S. 498, 26 S. Ct. 461.

distribution of his assets. As to this, the general rule is that the partnership or those who represent it cannot be permitted to compete with the separate creditors of one partner in the distribution of his estate.[58]

An exception to the rule has been made where the claim of the partnership against the partner is founded upon his wrongful and fraudulent appropriation of firm assets to his own use.[59]

Although the Uniform Partnership Act seems to be opposed,[60] it has usually been held that a surviving partner who has paid the partnership debts may, as to any deficiency left after applying the partnership assets, have a personal claim for a *pro rata* part against the estate of the deceased partner, upon which he may share *pari passu* with the individual creditors.[61]

§ 457. —— Partner competing with partnership creditors in individual assets.—Where the partnership creditors may reach the separate estate of one partner (as where he has no individual creditors, etc.) another partner who has a claim against that partner may not compete with the partnership creditors.[62] But if his claim were a negotiable one, his *bona fide* transferee for value might compete, and if there had been a novation a transferee could compete although the claim were not negotiable.

§ 458. —— Obtaining claims against both estates by contract.—While it is thus generally true that the joint and the

58 See Read v. Bailey (1877), 3 App. Cas. 94, Ames' Cas. 409; *In re* Hamilton (1880), 1 Fed. 800; Cowan v. Gill (1883), 11 Lea (Tenn.), 674; Lodge v. Fendal (1790), 1 Vesey, Jr. 166, Ames' Cas. 394. *Contra,* Bird v. Bird (1885), 77 Me. 499, 1 Atl. 455.

This rule seems not to be altered by the Bankruptcy Act, § 5 g. See *In re* Telfer (1910), 106 C. C. A. 366, 184 Fed. 224; *In re* Effinger (1910), 184 Fed. 728.

59 See Read v. Bailey, *supra; Ex parte* Sillitoe (1824), 1 Glyn & Jameson, 374, Ames' Cas. 428, Gilm. Cas. 569; McElroy v. Allfree (1906), 131 Iowa 518, 108 N. W. 119, Gilm. Cas. 573.

60 See Sec. 40 (i).

61 See Olleman v. Reagan (1867), 28 Ind. 109; *In re* Ruby (1896), 24 Ont. App. 509; Payne v. Matthews (1836), 6 Paige (N. Y. Ch.) 19, 29 Am. Dec. 738; [*contra* is Kirby v. Carpenter (1849), 7 Barb. (N. Y.) 373]; Morris v. Morris (1848), 4 Gratt. (Va.) 293; *In re* Dell (1878), 5 Saw. (U. S. D. C.) 344, Ames' Cas. 419.

62 See *Ex parte* Topping (1864), 4 De Gex. J. & S. 551, Ames' Cas.

separate assets are reserved for creditors of their respective class, it is possible that a creditor may have secured both a partnership and an individual obligation which will entitle him to prove his claim against both the partnership and the individual estates. Thus it has been held, though there are also cases to the contrary, that a creditor holding a partnership note separately endorsed by one partner may, in case of insolvency, prove against both estates.[63] A mere joint and several claim would be more questionable,[64] and if the obligation were really a partnership one only, although signed in the individual names of the partners instead of in the firm name, it would be treated accordingly.[65]

§ 459. Application of assets when there was no ostensible partnership—When there was merely an ostensible but not an actual partnership.—Questions as to the proper application of the assets also arise where there was really a partnership between the parties, but there was none ostensibly, as where, of two partners, one was dormant and the other appeared to the public as

473, Gilm. Cas. 576; *In re* Head (1894), 1 Q. B. 638.

63 See *In re* Farnum (1843), 8 Fed. Cas. 1057; *In re* Bradley (1871), 2 Biss. 515; *In re* Adams (1887), 29 Fed. 843; Williams Nat. Bank v. Hall (1893), 160 Mass. 171, 35 N. E. 666, Burd. Cas. 473; Fowlkes v. Bowers (1883), 79 Tenn. (11 Lea) 144; Union Nat. Bank v. Bank of Commerce (1880), 94 Ill. 271; Winslow v. Wallace (1888), 116 Ind. 317, 17 N. E. 923, 1 L. R. A. 179, Mechem's Cas. 658; Hawkins v. Mahoney (1898), 71 Minn. 155, 73 N. W. 720; *In re* Gray (1888), 111 N. Y. 404, 18 N. E. 719; Reed v. Bacon (1900), 175 Mass. 407, 56 N. E. 716; Anderson v. Stayton Bank (1916), 82 Oreg. 357, 159 Pac. 1033. *Contra:* Fayette Nat. Bank v. Kenney (1880), 79 Ky. 133, 2 Ky. Law R. 35, Mechem's Cas. 653; Hill v. Cornwall (1894), 95 Ky. 512, 26 S. W. 540, 16 Ky. Law R. 97, Burd. Cas. 474. Compare *In re* Barnard (1886), 32 Ch. Div. 447.

64 Under present Bankruptcy Act, *held*, not permissible: *In re* Mosier (1901), 112 Fed. 138. Under state insolvency statutes, permitted in *Ex parte* Nason (1880), 70 Me. 363. Compare *Ex parte* First Nat. Bank, *id.* 369. On tort claim permitted: Matter of Peck (1912), 206 N. Y. 55, 99 N. E. 258, 41 L. R. A. (N. S.) 1223, Ann. Cas. 1914 A 798.

65 See Adams v. Lumber Co. (1912), 120 C. C. A. 302, 202 Fed. 48.

the sole dealer. "In such a case," say the court in Tennessee,[66] "the ordinary rule touching partnership transactions and partnership property do not apply. The dormant partner has clearly no equity to require the application of the partnership property to the payment of the firm debts to his exoneration, as against the creditors of the ostensible partner who has been dealt with as the sole owner.[67] And the creditors of the firm, who have no equity except such as can be worked out through the dormant partner, cannot require that the partnership property be first applied to the satisfaction of their debts.[68] It is a race of diligence between the two classes of creditors, and equity will not interfere to deprive either of a legal advantage."

§ 460. —— The reverse of this case also arises, as where two persons are ostensibly partners, but are not really such. The rule properly to be applied here, as declared in a recent case in Wisconsin,[69] is, "that if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in com-

66 Whitworth v. Patterson (1880), 6 Lea 119.

67 Cammack v. Johnson (1839), 2 N. J. Eq. 163.

68 French v. Chase (1829), 6 Me. 166, Mechem's Cas. 1069; Lord v. Baldwin (1828), 6 Pick. (Mass.) 348.

69 Thayer v. Humphrey (1895), 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. R. 887, Burd. Cas. 117, Gilm. Cas. 546; Gibbs v. Humphrey (1895), 91 Wis. 111, 64 N. W. 750, Burd. Cas. 475. To same effect: Van Kleeck v. McCabe (1891), 87 Mich. 599, 49 N. W. 872, 24 Am. St. R. 182; Kelly v. Scott (1872), 49 N. Y. 595, Mechem's Cas. 682; Elliot v. Stevens (1859), 38 N. H. 311; Taylor v. Wilson (1878), 58 N. H. 465, Burd. Cas. 112; Codville Co. v. Smart (1907), 15 Ont. L. R. 357. See, also, Adams v. Albert (1898), 155 N. Y. 356, 49 N. E. 929, 63 Am. St. R. 675. Under the English Bankruptcy Act, dealing with goods of which the partnership had the "reputed ownership," see *Ex parte* Hayman (1878), 8 Ch. Div. 11.

petition with the creditors who have trusted the two as partners and the business as that of the two."

On the other hand, this conclusion has been vigorously denied,[70] upon the ground that the effect of estoppels is personal only, and does not affect the property; the person estopped is not in fact a partner and has no lien or other claim upon the partnership assets through which the creditors of the supposed partnership can reach them. The draftsmen of the Uniform Partnership Act express the belief that this latter conclusion is required by the language of Section 16. 1*b*, but this may well be thought doubtful.

§ 461. Application of assets of firms having one or more partners in common.—Where there are two or more firms having some but not all of their partners in common, the assets of the several firms must usually be regarded as distinct groups.[71] Where the membership was identical, then if it is properly to be regarded as a single partnership with branches, all of the assets are to be administered as a unit.[72] But if each was in fact a distinct and independent venture, then, though the partners were identical, the various groups of assets are, it is said, to be administered as those of separate firms.[73]

But, in accordance with a principle already referred to, it is held that an insolvent partnership composed of three of the four members of a second insolvent partnership cannot compete, as a creditor of the latter, with its other creditors in the distribution of its assets.[74]

70 See Broadway Nat. Bank v. Wood (1896), 165 Mass. 312, 43 N. E. 100, Mechem's Cas. 688, Burd. Cas. 129; Bixler v. Kresge (1895), 169 Pa. 405, 32 Atl. 414, 47 Am. St. R. 920, Burd. Cas. 115. Compare Swann v. Sanborn (1878), 4 Woods 625, Gilm. Cas. 557.

71 See Lewis v. United States (1875), 92 U. S. 618, 23 L. ed. 513; Bullock v. Hubbard (1863), 23 Cal. 495, 83 Am. Dec. 130; Haines Estate (1896), 176 Pa. 354, 35 Atl. 237, Burd. Cas. 482; Second Nat. Bank v. Burt (1883), 93 N. Y. 233.

72 See *In re* Vetterlein (1890), 44 Fed. 57; (Cf. *In re* Vetterlein (1871), 5 Ben. (U. S. D. C.) 311, Burd. Cas. 276); Campbell v. Colo. C. & I. Co. (1885), 9 Colo. 60, 10 Pac. 248.

73 See Gay v. Ray (1907), 195 Mass. 8, 80 N. E. 693.

74 See *ante*, § 451; McCruden v. Jonas (1896), 173 Pa. 507, 34 Atl. 224, 51 Am. St. R. 774, Burd. Cas. 478.

In bankruptcy, one of such firms has been permitted to prove as a creditor against the other.[75]

§ 462. Application of assets where there are successive firms —Uniform Partnership Act.—The problem of the proper distribution of a body of assets where, owing to changes of membership, several really different firms have carried on business in succession with substantially the same stock or property, is often an exceedingly complicated and difficult one. Theoretically, the assets of each firm are to be applied to the indebtedness of that firm. Each successive firm may have assumed the indebtedness of the preceding firm, but that will not always be true. A new partner may have come into or a former partner may have gone out of an existing partnership, without any assumption or adjustment of the existing debts, and the new partnership may immediately incur fresh indebtedness. The whole subject is now very much in confusion and uncertainty.

The Uniform Partnership Act proposes, in general, to regard all of the creditors at the various stages as creditors of the business at any stage, where the business is in fact continuous notwithstanding the changes in the personnel of the members. It provides for the rights of creditors when a new partner is admitted, or a partner retires, is expelled or dies, but the business is continued without liquidation of the debts of the partnership dissolved by this change in personnel. The provisions are too long for reproduction in the text, but will be found in full in Sections 41, 42 and 43, in the Appendix.

§ 463. Equitable rules do not defeat legal priorities.—The rules of distribution prevailing in courts of equity by which the individual creditors get priority in the individual assets do not usually operate to defeat priorities previously acquired therein by the partnership creditors in legal proceedings. Thus, it has been held that the lien of a judgment, rendered after the death of one partner, but for a partnership debt, and attaching to the individual real estate of the surviving partner, will not be dis-

75 See *In re* Buckhouse (1874), 2 Lowell 331, Gilm. Cas. 572.

turbed in favor of a later judgment against such survivor for his individual debt, even though such later judgment cannot otherwise be satisfied, and it was alleged that the prior one might have been satisfied out of the estate of the deceased partner.[76] Selden, J., after referring to the rule prevailing in courts of equity, as already noticed, said: "This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside, or in any way interfering with, an absolute right of priority obtained at law. In regard to all such cases the rule is, *Equitas sequitur legem.*"

So where the individual credits of one partner had been attached at the suit of the firm creditors and were subsequently attached by his individual creditor, it was held that the prior lien was effectual.[77] The court said that it was settled law in Massachusetts, [as it is generally], though otherwise in New Hampshire, that "in a suit against two or more copartners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner."

76 Meech v. Allen (1858), 17 N. Y. 300, 72 Am. Dec. 465, Mechem's Cas. 677, Ames' Cas. 326, Gilm. Cas. 499; *In re* Sandusky (1878), 17 Nat. Bankr. Reg. 452, Fed. Cas. No. 12,308, Burd. Cas. 421.

77 Stevens v. Perry (1873), 113 Mass. 380, Mechem's Cas. 961, Ames' Cas. 330, Burd. Cas. 377. To like effect: Allen v. Wells (1839), 22 Pick. (Mass.) 450, 33 Am. Dec. 757.

CHAPTER XXI.

OF THE FINAL ACCOUNTING.

§ 464. Necessity of accounting.—Upon the termination of the partnership, either by the act of the parties or the operation of law, an accounting usually becomes necessary. If the partnership is solvent, and the partners agree, they may close up their affairs, pay their debts and distribute the surplus, by their own act; but if they cannot agree, or if the partnership is insolvent and there are conflicting claims, an accounting in court becomes necessary. As has been already seen,[1] the court of equity is the forum in which partnership accounts are to be settled, and something has been already said as to who is entitled to demand an accounting.[2] It has been sometimes said that the right to demand an accounting is a test of being a partner, but the true theory seems to be that the right to an accounting follows because one is a partner.

§ 465. Basis of the accounting.—It has been seen[3] that it is the duty of each partner to keep full and accurate accounts of his partnership transactions, and that if he fails to do so, every uncertainty resulting therefrom will ordinarily be resolved against him. It has been seen also[4] that all profits and advantages resulting from partnership transactions must be accounted for, even though done in the name of one partner

1 *Ante*, § 227.
2 *Ante*, § 230.
3 See *ante*, § 175.
4 *Ante*, § 170.

only; and that a partner is not ordinarily entitled to extra compensation or interest in the absence of an agreement to pay it.[5] It has been seen, moreover, that the claims of partners for contribution as to debts paid, for reimbursement for advances, for indemnity against liability, and most other claims and demands arising between the partners themselves, are to be settled upon the final accounting.[6] Such an accounting becomes, therefore, the one great occasion for a comprehensive and effective settlement of partnership demands, between the partners.

§ 466. Same subject—Right of general creditors to present their demands.—But the claims of the partners as between themselves are usually not the only ones to be adjusted. The claims of the partnership creditors must also be ascertained and paid. These may be cared for by the voluntary action of the partners without suit. If no court has acquired control of the assets for the purpose of distribution, ordinary actions at law can usually be maintained notwithstanding the termination of the partnership. Or in an action in equity instituted by a partner or a creditor to wind up the business and distribute the assets, the claims of the partnership creditors may be presented and proved without the commencement of separate actions to enforce them.

Debts must be collected either by the partners themselves, or by a receiver in case the partnership affairs are being settled by a court of equity. A sale of the tangible property is also to be made, and is practically a matter of course, unless for special reason shown, some other method of disposition is ordered.

When the assets have thus been reduced to an available and distributable form, and the claims of the partners among themselves and of creditors against the firm have been ascertained, the estate is ready for distribution among those entitled according to the priorities which the law establishes.

§ 467. ——As has been already seen in a previous section,[7] the partners themselves may, in pursuance of well-settled and

[5] *Ante*, §§ 178, 179.

[6] *Ante*, § 190.

[7] See *ante*, § 227.

long-established rules, have the aid of courts of equity in securing accountings, dissolutions and distributions of the partnership assets. Other persons who claim through the partners may also often have such aid to secure an accounting and distribution. The mere general creditor does not usually need such aid, as he may reach the assets through ordinary legal process. But at times a creditor who has exhausted his legal remedies may have recourse to equitable ones, like a creditor's bill, for example. Moreover, in many states, there are statutory proceedings, such as state insolvency proceedings for example, by means of which he may bring the assets under judicial control; and, during the existence of a national bankruptcy law, he may have the remedies which such a statute provides. The consideration of the application of these remedies, however, is not within the scope of the present work.

§ 468. Partnership debts to be first paid.—It follows from what has been said as to the application of the firm assets [8] that the partnership debts are to be paid first, and that claims of the individual partners against the firm or each other cannot compete with the claims of the firm creditors. It is thus said to be a general rule that by no form of claim can one partner compete with the firm creditors in the distribution of the firm assets; [9] but this is a question which has been considered in the preceding chapter.

§ 469. Manner of accounting.—Mr. Justice Lindley lays down the following rules,[10] which have been generally adopted, as to the manner of accounting: "In adjusting the accounts of

[8] See *ante*, § 449.

[9] See Edison Illuminating Co. v. DeMott (1893), 51 N. J. Eq. 16, 25 Atl. 952; *Ex parte* Blythe (1881), 16 Ch. Div. 620.

[10] 2 Lindley on Partnership, 402 (Ewell's 2d Am. ed.). See, also, Molineaux v. Raynolds (1896), 54 N. J. Eq. 559, 35 Atl. 536, Burd. Cas. 169.

The partners may, of course, by agreement vary these rules so far as they affect themselves alone: Groth v. Kersting (1896), 23 Colo. 213, 47 Pac. 393, Burd. Cas. 563, Gilm. Cas. 484; Huger v. Cunningham (1906), 126 Ga. 684, 56 S. E. 64.

partners, losses ought to be paid first out of assets excluding capital, next out of capital, and lastly by having recourse to the partners individually; and the assets of the partnership should be applied as follows:

"1. In paying the debts and liabilities of the firm to non-partners.

"2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.[11]

"3. In paying to each partner ratably what is due from the firm to him in respect of capital.

"4. The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary be shown."[12]

§ 470. Same subject.—"If the assets are not sufficient to pay the debts and liabilities to non-partners," continues Mr. Justice Lindley, "the partners must treat the difference as a loss and make it up by contributions *inter se*. If the assets are more than sufficient to pay the debts and liabilities of the partnership to non-partners, but are not sufficient to repay the partners their respective advances, the amount of unpaid advances ought, it is conceived, to be treated as a loss to be met like other losses. In such a case the advances ought to be treated as a debt of the firm, but payable to one of the partners instead of to a stranger. If, after paying all the debts and liabilities of the firm and the advances of the partners, there is still a surplus, but not suffi-

11 This must be secured to him before a distribution of capital among the other partners. It is a violation of this right to distribute the capital and give him merely a judgment to collect his advances from the other partners *pro rata*. See Leserman v. Bernheimer (1889), 113 N. Y. 39, 20 N. E. 869, Mechem's Cas. 1072, Burd. Cas. 565. It will take precedence of a mortgage upon one partner's interest: Warren v. Taylor (1877), 60 Ala. 218, Mechem's Cas. 1081, Burd. Cas. 580. See, also, Folsom v. Marlette (1897), 23 Nev. 459, 49 Pac. 39, Burd. Cas. 570.

12 As has been already seen, *ante*, § 145, it is the general rule that, in the absence of some agreement to the contrary, profits and losses are to be shared equally among the partners, even although their respective contributions to the capital were unequal. See Raymond v. Putnam (1862), 44 N. H. 160, Gilm. Cas. 490. See, also, McMurtrie v. Guiler (1903), 183 Mass. 451, 67 N. E. 358, Gilm. Cas. 74.

cient to pay each partner his capital, the balances of capitals remaining unpaid must be treated as so many losses, to be met like other losses."

§ 471. —— Uniform Partnership Act.—The Uniform Partnership Act contains detailed provisions upon this subject, which are in substantial conformity with those mentioned in the preceding section as to the order of application. It also contains other provisions which need not be repeated here. (Section 40.) The complete text is given in the Appendix.

§ 472. Same subject—Loss of capital, how borne.—"In the absence of controlling agreement," said the court in a leading case,[13] "partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital and the other nothing but his labor or services. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

"If, as is not infrequently the case in a partnership for a single adventure, the mere *use* of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof.[14]

13 Whitcomb v. Converse (1875), 119 Mass. 38, 20 Am. Rep. 311, Mechem's Cas. 692, Burd. Cas. 575, Gilm. Cas. 488. See, also, Taft v. Schwamb (1875), 80 Ill. 289, Burd. Cas. 577. Compare Magilton v. Stevenson (1896), 173 Pa. 560, 34 Atl. 235, Burd. Cas. 573.

14 [For a later case holding the particular partnership to be on this basis, see Meadows v. Mocquot (1901), 110 Ky. 220, 61 S. W. 28, 22 Ky. Law R. 1646.] See, also, Cameron v. Watson (1858), 10 Rich. (S. Car.) Eq. 64, 103; Baker v. Safe Deposit Co. (1900), 90 Md. 744, 45 Atl. 1028, 78 Am. St. R. 463; Manley v. Taylor (1884), 50 N. Y. Super. 26; Hasbrouck v. Childs (1858), 16 N. Y. Super. (3 Bosw.) 105; Everly v. Durborrow (1871), 8 Phila. 93, [but compare Emerick v. Moir (1889), 124 Pa. 498, 17 Atl. 1]; Stumph v. Bauer (1881), 76 Ind. 157, Gilm. Cas. 175.

"But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot, indeed, be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but, if the assets of the partnership upon a final settlement are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership."

§ 473. Same subject.—In accordance with these principles, it has been held that where one partner contributes experience, skill, or the like, and the other money, the former is not, upon dissolution, entitled to any part of the cash capital, but each takes back, so far as possible, what he put in—one his experience, etc., and the other his money.[15] If, however, where one contributes labor and the other money [not merely its *use*], there is, upon dissolution, a loss of capital, it has been held that the one who contributed labor only must aid in making good the loss of the other who contributed money,[16] though there are cases which hold the contrary.[17]

In making contribution at law, the loss is divided equally among the whole number, without regard to their solvency or insolvency; but in equity the loss is made to rest upon the solvent partners alone.[18] The Uniform Partnership Act adopts the equity rule.[19]

15 Shea v. Donahue (1885), 15 Lea (Tenn.), 160, 54 Am. Rep. 407, Mechem's Cas. 695, Gilm. Cas. 168; Conroy v. Campbell (1879), 13 Jones & Sp. (N. Y.) 326.

16 Whitcomb v. Converse, *supra;* Hayes v. Hayes (1889), 66 N. H. 134, 19 Atl. 571.

17 See Baker v. Safe Deposit Co., *supra;* Meadows v. Mocquot, *supra;* and other cases cited in preceding section.

18 Whitcomb v. Converse, *supra;* 1 Lindley on Partnership (Ewell's 2d Am. ed.), 376.

19 Sec. 40 (d).

§ 474. Opening and restating accounts.—When once a partnership account has been settled, it will not be easily disturbed, particularly if much time has elapsed. Still, even after long acquiescence, an account may be reopened and corrected if fraud was practiced in the first accounting; and, within a reasonable time, an account may be reopened for the correction of errors or omissions. The fraud, however, must be clearly stated and proved, and the mistake or omission must be as to some matter not known to the complaining party at the time it was committed.[20]

[20] See Claflin v. Bennett (1892), 51 Fed. 693; Valentine v. Wysor (1890), 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788, Mechem's Cas. 500, Merriwether v. Hardeman (1879), 51 Tex. 436; Varner's Appeal (1888), 2 Monaghan (Pa.) 228, 16 Atl. 98; Cobb v. Cole (1890), 44 Minn. 278, 46 N. W. 364; King v. White (1890), 63 Vt. 158, 21 Atl. 535, 25 Am. St. R. 752.

A partner who has been defrauded into making a private settlement with his partner may institute a suit for accounting without rescinding the settlement and restoring the fraudulent partner to *statu quo:* Daniel v. Gillespie (1909), 65 W. Va. 366, 64 S. E. 254; Oliver v. House (1906), 125 Ga. 637, 54 S. E. 732.

CHAPTER XXII.

OF LIMITED PARTNERSHIPS.

§ 475. Of the nature of such partnerships.—Something has been already said in relation to these partnerships,[1] but they require a little fuller consideration. The purpose of such organizations is to permit the formation of partnerships in which some of the partners, who manage the business, shall have the general personal liability of ordinary partners, while other of the partners, who take no part in the management, may contribute a given amount of capital and assume no liability beyond the amount so contributed. The former are usually designated as general partners, and the latter as special partners.

§ 476. Must be authorized by statute.—Partnerships of this nature can be organized only when permitted by statute, but statutes have been enacted for this purpose in the majority of the states.

After many years, England adopted a limited partnership act in 1907. A Uniform Limited Partnership Act has also been prepared by the Commissioners on Uniform State Laws and recommended to the States for enactment. It will be found in the Appendix. It contains many provisions not usually included in the older acts.

The demand for such a statute is felt less in States which

[1] *Ante*, §§ 9, 10.

have liberal incorporation statutes. In many of the States it is practically as easy to form a corporation in which *all* of the associates have a limited liability as it is to form a limited partnership in which only *part* of the associates would have such an exemption.

Only a very general sketch of this form of partnership will here be undertaken.

§ 477. The usual statutory requirements.—The statutory provisions are not entirely uniform, but they are substantially so. They require usually the execution of a certificate which shall set forth who the partners are, with their residence; who are to be the general partners, and who the special partners; the name under which the partnership is to do business; the amount of capital actually contributed by the special partners; the business to be conducted, and the date at which the partnership is to begin and end.

This statement or certificate is to be published for a designated period, and is also to be recorded in some specified public office.

The names of all the general partners must usually appear in the firm name (though the statutes are not uniform on this point), but the names of the special partners must not appear.[2] Where the names of all the general partners are required to be in the firm name, there must usually be no such addition as "& Co.," indicating that there are other general partners. They are sometimes required to add the word "limited" to the firm name.

The contribution of the special partners is usually required to be in cash, and when this is the requirement the courts have been very strict in refusing to recognize anything but *cash* as sufficient,[3] though a more liberal interpretation has been made in more recent cases.[4]

[2] See as to this Buck v. Alley (1895), 145 N. Y. 488, 40 N. E. 236, Burd. Cas. 624; Groves v. Wilson (1897), 168 Mass. 370, 47 N. E. 100, Burd. Cas. 630.

[3] See Lineweaver v. Slagle (1885), 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775, Gilm. Cas. 619; *In re* Allen (1889), 41 Minn. 430, 43 N. W. 382; Durant v. Abendroth (1877), 69 N. Y. 148, 25 Am. Rep. 158, Mechem's Cas. 706.

[4] The controversy here has been chiefly over attempted payment by

In a few States the contribution may be either in cash or other property, but usually at its cash value.

As will be observed, the Uniform Limited Partnership Act contains a variety of provisions not usually contained in the older acts, but it has not been thought necessary here to point out the changes.

§ 478. Necessity for complying with requirements. — Inasmuch as the effect of such organizations is to restrict the ordinary liabilities of certain of the partners, it is held that there must be at least a substantially full and exact compliance with the statutory requirements.[5]

And since it is only by force of the statute that the limited liability is secured, it follows that a failure to comply with the statutory requirements will render the special partners liable to third persons like general partners.[6] As is said in one case,[7]

checks: See Manhattan Co. v. Laimbeer (1888), 108 N. Y. 578, 15 N. E. 712, Gilm. Cas. 615; Chick v. Robinson (1899), 37 C. C. A. 205, 95 Fed. 619, Mechem's Cas. 699; White v. Eiseman (1892), 134 N. Y. 101, 31 N. E. 276, 52 L. R. A. 833, Mechem's Cas. 1099, Burd. Cas. 640.

5 See Selden v. Hall (1886), 21 Mo. App. 452; White v. Eiseman (1892), 134 N. Y. 101, 31 N. E. 276, 52 L. R. A. 833, Mechem's Cas. 1099, Burd. Cas. 640; Lineweaver v. Slagle (1885), 64 Md. 465, 54 Am. Rep. 775, 2 Atl. 693, Gilm. Cas. 619; Haddock v. Grinnell Mfg. Co. (1885), 109 Pa. 372, 1 Atl. 174; Crouch v. First Nat. Bank (1895), 156 Ill. 342, 40 N. E. 974.

6 See Sheble v. Strong (1889), 128 Pa. 315, 18 Atl. 397; Vanhorn v. Corcoran (1889), 127 Pa. 255, 4 L. R. A. 386, 18 Atl. 16; Manhattan Co. v. Laimbeer (1888), 108 N. Y. 578, 15 N. E. 712, Gilm. Cas. 615; Briar Hill C. & I. Co. v. Atlas Works (1891), 146 Pa. 290, 23 Atl. 326; Metropolitan Nat. Bank v. Sirret (1884), 97 N. Y. 320, 15 Abb. N. C. 318, Burd. Cas. 633; First Nat. Bank v. Creveling (1896), 177 Pa. 270, 35 Atl. 595, Burd. Cas. 638; Myers v. Electric Co. (1896), 59 N. J. L. 153, 35 Atl. 1069, Burd. Cas. 644.

7 Blumenthal v. Whitaker (1895), 170 Pa. 309, 33 Atl. 103. The statutes themselves often provide that a false statement in the certificate shall defeat the limited liability. Sheble v. Strong, *supra;* Durant v. Abendroth (1877), 69 N. Y. 148, 25 Am. R. 158, Mechem's Cas. 706. But the failure of the recording officer to properly record will not usually defeat it (Manhattan Co. v. Laimbeer, *supra*), unless the party was himself in fault. Henkel v. Heyman (1878), 91 Ill. 96, Mechem's Cas. 709. A special partner who by reason of failure to comply with the statute becomes liable like

"*prima facie,* a firm transacting business is a general partnership. * * * A limited partnership that has not complied with the law of its creation is not a limited partnership at all. It is, however, a partnership in which all the members are liable as at common law."

§ 479. Who may form them.—Competency to become a member of a limited partnership is, in general, the same as in the case of an ordinary partnership. Thus, unless the statute otherwise provides,[8] infants and married women are competent to the same extent as they have been seen to be in such partnerships.[9]

As to number, the statutes usually require "one or more" of each class, though a few statutes require two or more general partners at least, or two or more of each class.

§ 480. For what business authorized.—In many of the states no restrictions are placed upon the kind of business that may be carried on by a limited partnership; in others certain kinds of business, usually insurance and banking, are excepted.

§ 481. Conduct of business.—The general partners alone represent the firm and carry on its business. If the special partner takes part in its management, or if his name is used with his consent, he ordinarily loses irretrievably his limited liability and becomes liable as a general partner.[10] Contracts must therefore be made by and in the name of the general partners, and suits must be brought by and against them.[11]

a general partner, is, nevertheless, held not to thereby become a general partner in fact, so that he would be liable like one if he withdrew without giving notice. Tilge v. Brooks (1889), 124 Pa. 178, 16 Atl. 746, 2 L. R. A. 796, Gilm. Cas. 627. *Contra:* Haviland v. Chace (1860), 39 Barb. (N. Y.) 283.

8 Some statutes require all the parties to be "of full age".

9 See Continental Nat. Bank v. Strauss (1893), 137 N. Y. 148, 553, 32 N. E. 1066, Burd. Cas. 619 (infant); Benard v. Packard (1894), 12 C. C. A. 123, 64 Fed. 309, Burd. Cas. 623.

10 See Buck v. Alley (1895), 145 N. Y. 488, 40 N. E. 236, Burd. Cas. 624; Groves v. Wilson (1897), 168 Mass. 370, 47 N. E. 100, Burd. Cas. 630; Farnsworth v. Boardman (1881), 131 Mass. 115; Strang v. Thomas (1902), 114 Wis. 599, 91 N. W. 237.

11 See Columbia Land and Cattle

§ 482. **Withdrawal of capital.**—The withdrawal of his capital by the limited partner before the satisfaction of all of the demands against the partnership is forbidden by the statutes, under penalties which range from a liability to restore it to the incurring of the liability of a general partner.

§ 483. **Special partner as a creditor.**—Many of the statutes contain provisions that no special partner shall be paid as a creditor until all the other creditors of the firm are satisfied. Whether this prohibition refers to a claim for the restoration of his capital merely, or extends to later loans, etc., made to the firm, is in dispute.[12]

§ 484. **Renewal.**—The statutes commonly provide for renewing the partnership at the expiration of the original term, and this may be done usually by making a renewal of the certificate, publication and record. Whether upon such renewal it must be the fact that the capital originally contributed is still intact and unimpaired (under the penalty, if it is not, of charging the special partners like general partners), is the subject of a sharp conflict in the cases, which does not seem to be referable merely to differences in phraseology.[13]

§ 485. **Dissolution and notice.**—If not renewed, the limited partnership comes to an end as a limited partnership at the

Co. v. Daly (1891), 46 Kan. 504, 26 Pac. 1042, Gilm. Cas. 625; Sharp v. Hutchinson (1885), 100 N. Y. 533, 3 N. E. 500, Mechem's Cas. 718; Jaffe v. Krum (1885), 88 Mo. 669, Mechem's Cas. 716, Gilm. Cas. 626.

12 That it applies to all claims, see Jaffe v. Krum (1886), 88 Mo. 669, Mechem's Cas. 716, Gilm. Cas. 626; Dunning's Appeal (1863), 44 Pa. 150. *Contra:* Clapp v. Lacey (1868), 35 Conn. 463, Burd. Cas. 611.

13 That it must be unimpaired, see Haddock v. Grinnell Mfg. Co. (1885), 109 Pa. 372, 1 Atl. 174; Fourth St. Nat. Bank v. Whitaker (1895), 170 Pa. 297, 33 Atl. 100, Burd. Cas. 655. Under the statute as amended: Durgin v. Colburn (1900), 176 Mass. 110, 57 N. E. 213, Mechem's Cas. 713. That the renewal refers merely to the fact of original contribution, see Fifth Ave. Bank v. Colgate (1890), 120 N. Y. 381, 24 N. E. 799, 8 L. R. A. 712, 4 Silvernail Ct. App. 544; Hogan v. Hadzsits (1897), 113 Mich. 568, 71 N. W. 1092, Burd. Cas. 600.

time designated, and if continued afterward it will be as a general partnership. It may also be terminated before that time by operation of law or the act of the partners, like general partnerships.[14] Where it is so terminated before the time limited has expired, and no statutory provision for notice is made, notice must usually be given in the same cases and manner as upon the dissolution of a general partnership; though where it is terminated by the act of the partner before the expiration of the stipulated term, the statutes usually require that notice shall be published and recorded like the orginal certificate. Where it comes to an end by expiration of the time fixed, no notice is necessary, as the published and recorded certificate gives notice to all the world.

14 See the discussion in Ames v. Downing (1850), 1 Bradf. Sur. (N. Y.) 321, Burd. Cas. 606, Gilm. Cas. 610, wherein it is held that the death of the limited partner dissolves the partnership.

APPENDIX A

UNIFORM PARTNERSHIP ACT

PART I.

PRELIMINARY PROVISIONS.

SECTION 1. [Name of Act.] This act may be cited as Uniform Partnership Act.

SEC. 2. [Definition of Terms.] In this act, "Court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

SEC. 3. [Interpretation of Knowledge and Notice.] (1) A person has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice

(*a*) States the fact to such person, or

(*b*) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

SEC. 4. [Rules of Construction.] (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) The law of estoppel shall apply under this act.

(3) The law of agency shall apply under this act.

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of

any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.

SEC. 5. [Rules for Cases not Provided for in this Act.] In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

PART II.

NATURE OF A PARTNERSHIP.

SEC. 6. [Partnership Defined.] (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

SEC. 7. [Rules for Determining the Existence of a Partnership.] In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(*a*) As a debt by installments or otherwise,

(*b*) As wages of an employee or rent to a landlord,

(*c*) As an annuity to a widow or representative of a deceased partner,

(*d*) As interest on a loan, though the amount of payment vary with the profits of the business,

(*e*) As the consideration for the sale of the good-will of a business or other property by installments or other-wise.

SEC. 8. [Partnership Property.] (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

PART III.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.

SEC. 9. [Partner Agent of Partnership as to Partnership Business.] (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(*a*) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.

(*b*) Dispose of the good-will of the business,

(*c*) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(*d*) Confess a judgment,

(*e*) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

SEC. 10. [Conveyance of Real Property of the Partnership.] (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the

partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

SEC. 11. [Partnership Bound by Admission of Partner.] An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.

SEC. 12. [Partnership Charged with Knowledge of or Notice to Partner.] Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

SEC. 13. [Partnership Bound by Partner's Wrongful Act.] Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

SEC. 14. [Partnership Bound by Partner's Breach of Trust.] The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

SEC. 15. [Nature of Partner's Liability.] All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

SEC. 16. [Partner by Estoppel.] (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

SEC. 17. [Liability of Incoming Partner.] A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property. [illegible] 41.

PART IV.

RELATIONS OF PARTNERS TO ONE ANOTHER.

SEC. 18. [Rules Determining Rights and Duties of Partners.] The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the

ordinary and proper conduct of its business, or for the preservation of its business or property.

(*c*) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(*d*) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(*e*) All partners have equal rights in the management and conduct of the partnership business.

(*f*) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(*g*) No person can become a member of a partnership without the consent of all the partners.

(*h*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

SEC. 19. [Partnership Books.] The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

SEC. 20. [Duty of Partners to Render Information.] Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

SEC. 21. [Partner Accountable as a Fiduciary.] Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

SEC. 22. [Right to an Account.] Any partner shall have the right to a formal account as to partnership affairs:

(*a*) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,

(*b*) If the right exists under the terms of any agreement,

(*c*) As provided by section 21,

(*d*) Whenever other circumstances render it just and reasonable.

SEC. 23. [Continuation of Partnership Beyond Fixed Term.] (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is *prima facie* evidence of a continuation of the partnership.

PART V.

PROPERTY RIGHTS OF A PARTNER.

SEC. 24. [Extent of Property Rights of a Partner.] The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

SEC. 25. [Nature of a Partner's Right in Specific Partnership Property.]

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(*a*) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(*b*) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(*c*) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(*d*) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(*e*) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

SEC. 26. [Nature of Partner's Interest in the Partnership.] A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

SEC. 27. [Assignment of Partner's Interest.] (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business

or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

SEC. 28. [Partner's Interest Subject to Charging Order.] (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(*a*) With separate property, by any one or more of the partners, or

(*b*) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

PART VI.

DISSOLUTION AND WINDING UP.

SEC. 29. [Dissolution Defined.] The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 30. [Partnership Not Terminated by Dissolution.] On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 31. [Causes of Dissolution.] Dissolution is caused:

(1) Without violation of the agreement between the partners,

(*a*) By the termination of the definite term or particular undertaking specified in the agreement,

(*b*) By the express will of any partner when no definite term or particular undertaking is specified,

(*c*) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(*d*) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

SEC. 32. [Dissolution by Decree of Court.] (1) On application by or for a partner the court shall decree a dissolution whenever:

(*a*) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(*b*) A partner becomes in any other way incapable of performing his part of the partnership contract,

(*c*) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(*d*) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(*e*) The business of the partnership can only be carried on at a loss,

(*f*) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 28 or 29:

(*a*) After the termination of the specified term or particular undertaking,

(*b*) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

SEC. 33. [General Effect of Dissolution on Authority of Partner.] Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(*a*) When the dissolution is not by the act, bankruptcy or death of a partner; or

(*b*) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

SEC. 34. [Right of Partner to Contribution From Co-partners After Dissolution.] Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(*a*) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(*b*) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

SEC. 35. [Power of Partner to Bind Partnership to Third Persons After Dissolution.] (1) After dissolution a partner can bind the partnership except as provided in Paragraph (3)

(*a*) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(*b*) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under Paragraph (1*b*) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(*a*) Unknown as a partner to the person with whom the contract is made; and

(*b*) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(*a*) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(*b*) Where the partner has become bankrupt; or

(*c*) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in Paragraph (1*b*II).

(4) Nothing in this section shall affect the liability under Section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

SEC. 36. [Effect of Dissolution on Partner's Existing Liability.] (1)

The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

SEC. 37. [Right to Wind Up.] Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

SEC. 38. [Rights of Partners to Application of Partnership Property.] (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, *bona fide* under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(*a*) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(*b*) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages re-

coverable under clause (2*a*II) of this section, and in like manner indemnify him against all present or future partnership liabilities.

(*c*) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2*b*) all the rights of a partner under paragraph (1), subject to clause (2*a*II), of this section,

II. If the business is continued under paragraph (2*b*) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

SEC. 39. [Rights Where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(*a*) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(*b*) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(*c*) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

SEC. 40. [Rules for Distribution.] In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(*a*) The assets of the partnership are;

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (*b*) of this paragraph.

(*b*) The liabilities of the partnership shall rank in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(*c*) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(*d*) The partners shall contribute, as provided by section 18 (*a*) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to

contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(*e*) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (*d*) of this paragraph.

(*f*) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (*d*) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(*g*) The individual property of a deceased partner shall be liable for the contributions specified in clause (*d*) of this paragraph.

(*h*) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(*i*) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors,

II. Those owing to partnership creditors,

III. Those owing to partners by way of contribution.

SEC. 41. [Liability of Persons Continuing the Business in Certain Cases.]

(1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors

of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2*b*), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

SEC. 42. [Rights of Retiring or Estate of Deceased Partner When the Business is Continued.] When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2*b*), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act.

SEC. 43. [Accrual of Actions.] The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership con-

tinuing the business, at the date of dissolution in the absence of any agreement to the contrary.

PART VII.

MISCELLANEOUS PROVISIONS.

SEC. 44. [When Act Takes Effect.] This act shall take effect on the .... day of .... one thousand nine hundred and ....

SEC. 45. [Legislation Repealed.] All acts or parts of acts inconsistent with this act are hereby repealed.

UNIFORM LIMITED PARTNERSHIP ACT

SECTION 1. [Limited Partnership Defined.] A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

SEC. 2. [Formation.] (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated.

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned.

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of [here designate the proper office].

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

SEC. 3. [Business Which May Be Carried On.] A limited partnership may carry on any business which a partnership without limited partners may carry on, except [here designate the business to be prohibited].

SEC. 4. [Character of Limited Partner's Contribution.] The contributions of a limited partner may be cash or other property, but not services.

SEC. 5. [A Name Not To Contain Surname of Limited Partner; Exceptions.] (1) The surname of a limited partner shall not appear in the partnership name, unless

(*a*) It is also the surname of a general partner, or

(*b*) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

SEC. 6. [Liability for False Statements in Certificate.] If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false.

(*a*) At the time he signed the certificate, or

(*b*) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in Section 25 (3).

SEC. 7. [Limited Partner Not Liable to Creditors.] A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

SEC. 8. [Admission of Additional Limited Partners.] After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of Section 25.

SEC. 9. [Rights, Powers and Liabilities of a General Partner.] (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(*a*) Do any act in contravention of the certificate,

(*b*) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(*c*) Confess a judgment against the partnership,

(*d*) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

SEC. 10. [Rights of a Limited Partner.] (1) A limited partner shall have the same rights as a general partner to

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in Sections 15 and 16.

SEC. 11. [Status of Person Erroneously Believing Himself a Limited Partner.] A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

SEC. 12. [One Person both General and Limited Partner.] (1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

SEC. 13. [Loans and Other Business Transactions with Limited Partner.] (1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners,

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

SEC. 14. [Relation of Limited Partners Inter Se.] Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

SEC. 15. [Compensation of Limited Partner.] A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

SEC. 16. [Withdrawal or Reduction of Limited Partner's Contribution.] (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(*a*) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(*b*) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(*c*) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(*a*) On the dissolution of a partnership, or

(*b*) When the date specified in the certificate for its return has arrived, or

(*c*) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership,

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(*a*) He rightfully but unsuccessfully demands the return of his contribution, or

(*b*) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required

by paragraph (1*a*) and the limited partner would otherwise be entitled to the return of his contribution.

SEC. 17. [Liability of Limited Partner to Partnership.] (1) A limited partner is liable to the partnership

(*a*) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(*b*) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(*a*) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(*b*) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

SEC. 18. [Nature of Limited Partner's Interest in Partnership.] A limited partner's interest in the partnership is personal property.

SEC. 19. [Assignment of Limited Partner's Interest.] (1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with Section 25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those

liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under Sections 6 and 17.

SEC. 20. [Effect of Retirement, Death or Insanity of a General Partner.] The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(*a*) Under a right so to do stated in the certificate, or

(*b*) With the consent of all members.

SEC. 21. [Death of Limited Partner.] (1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

SEC. 22. [Rights of Creditors of Limited Partner.] (1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

SEC. 23. [Distribution of Assets.] (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(*a*) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(*b*) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(*c*) Those to limited partners in respect to the capital of their contributions,

(*d*) Those to general partners other than for capital and profits,

(*e*) Those to general partners in respect to profits,

(*f*) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

SEC. 24. [When Certificate Shall be Cancelled or Amended.] (1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(*a*) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(*b*) A person is substituted as a limited partner,

(*c*) An additional limited partner is admitted,

(*d*) A person is admitted as a general partner,

(*e*) A general partner retires, dies or becomes insane, and the business is continued under Section 20.

(*f*) There is a change in the character of the business of the partnership,

(*g*) There is a false or erroneous statement in the certificate,

(*h*) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(*i*) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(*j*) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

SEC. 25. [Requirements for Amendment and for Cancellation of Certificate.] (1) The writing to amend a certificate shall

(*a*) Conform to the requirements of Section 2 (1*a*) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(*b*) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the [here designate the proper court] to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the [here designate the responsible official in the office designated in Section 2] in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and when the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office [here designate the office designated in Section 2] where the certificate is recorded

(*a*) A writing in accordance with the provisions of paragraph (1), or (2) or

(*b*) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act.

SEC. 26. [Parties to Actions.] A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

SEC. 27. [Name of Act.] This act may be cited as The Uniform Limited Partnership Act.

SEC. 28. [Rules of Construction.] (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action on proceedings begun or right accrued before this act takes effect.

SEC. 29. [Rules for Cases not Provided for in this Act.] In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

UNIFORM FRAUDULENT CONVEYANCE ACT

The following provisions apply particularly to Partnerships.

SEC. 2. (2) In determining whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

SEC. 8. Every conveyance of partnership property, and every partnership obligation incurred, when the partnership is, or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred

(*a*) To a partner, whether with or without a promise by him to pay partnership debts, or

(*b*) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

BANKRUPTCY ACT OF 1898

SEC. 5. PARTNERS.—(*a*) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(*b*) The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

(*c*) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

(*d*) The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

(*e*) The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

(*f*) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

(*g*) The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

(*h*) In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

APPENDIX B

PARTNERSHIP FORMS

The following simple form may prove suggestive. It is divided into distinct clauses, to a greater extent than might otherwise be thought advisable, in order to give prominence to each. A great variety of special clauses, not here included, are in use in special cases.

ARTICLES OF PARTNERSHIP.

This agreement, made this first day of January, 1920, between Adam Smith, Edwin Arnold and Robert Burns, all of the city of Chicago, county of Cook, and state of Illinois, witnesseth:

1. The said parties hereby agree that they will become and be partners in business for the purpose and upon the terms hereinafter stated.
2. The firm name of the partnership shall be Adam Smith & Company.
3. The business to be carried on by said partnership is that of buying and selling dry goods at wholesale and retail, and carrying on a general dry goods business.
4. The place at which the said partnership is to be carried on is the said city of Chicago.
5. The term for which the said partnership is organized is ten years from and after February 1, 1920.
6. The capital of said firm is to be the sum of $150,000, of which each of the said partners is to contribute one-third part in cash, on or before February 15, 1920, and they are to share in the profits and losses of said business in the same proportion.
7. Each of said partners is to give his undivided time and attention to the said business, and is to use his utmost endeavors to promote the interests of the said firm.
8. Books of account of the transactions of said partnership shall be kept at the place of business, and shall be at all times open to inspection by any partner. Each partner shall cause to be entered upon said books a just and true account of all his dealings, receipts and expenditures for or on account of said firm.
9. In the month of January in each year, a full and complete inventory of stock shall be taken, and a complete statement of the condition of said partnership shall be made, and an accounting between the said partners

shall be had, and the profits or losses of the preceding year shall then be divided and paid or contributed. The fiscal year shall begin on February 1.

10. Each of said partners shall be permitted to draw from the funds of said firm the sum of $100 per week for his living expenses. Such sums so drawn shall be charged to him, and at the annual accounting shall be charged against his share of the profits. If his share of the profits shall not be equal to the sum so drawn, he shall at once pay the deficiency into the said firm. Such deficiency shall draw interest at six per cent. until paid.

11. Neither of said partners shall, without the consent of the others, compromise or release debts except upon full payment thereof, or engage in any unusual transaction, or make any contract on the partnership account involving more than $1000; or use the firm's name, credit or property for other than partnership purposes; or sign or indorse negotiable paper or become surety for third persons; or engage in any speculation; or knowingly do any act by which the interests of said partnership shall be imperiled or prejudiced.

12. All questions of difference as to the management of the business shall be decided by a majority of said partners, and no partner shall knowingly do any act in relation thereto contrary to the decision of the majority.

13. Either of said partners may retire from the said partnership at the expiration of any fiscal year upon giving his said partners three months' notice of his intention so to do.

14. Upon the dissolution of said partnership, by reason of the death, withdrawal or other act of any partner before the expiration of said term, the remaining partners may, if they so desire, continue the business, and they shall have the right to purchase the interest of such partner in the business, assets and good-will, by paying the value of such interest as determined by the last annual inventory and accounting, together with six per cent. interest upon such value since such inventory. Upon such payment the retiring partner or his representatives shall execute and deliver to the remaining members all necessary conveyances of such interest. The continuing members shall assume all of the existing firm obligations, and hold the sellers harmless from all liability thereon. The continuing partners may use the former firm name if it does not contain the name of the retiring partner.

15. Upon the final dissolution of said firm by lapse of time or otherwise, the said business shall be wound up, the debts paid, and the surplus divided between the partners in accordance with their interest therein.

In witness whereof, we have hereunto set our hands, the day and year first above written.

Adam Smith.
Edwin Arnold.
Robert Burns.

NOTICE OF DISSOLUTION.

(To be published and also delivered to all previous creditors.)

Notice is hereby given that the copartnership heretofore existing between Adam Smith, Edwin Arnold and Robert Burns, under the firm name of Adam Smith & Company, and doing business at Chicago, Illinois, has been this day dissolved by mutual consent. [*If desired, add:* Robert Burns has retired from said firm and business, but the said Adam Smith and Edwin Arnold will continue the business at the same place and under the same firm name.]

Dated, Chicago, Illinois, May 1, 1921.

ADAM SMITH.
EDWIN ARNOLD.
ROBERT BURNS.

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